IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 576

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN and HERBERT L. GIPSON

Petitioners

vs.

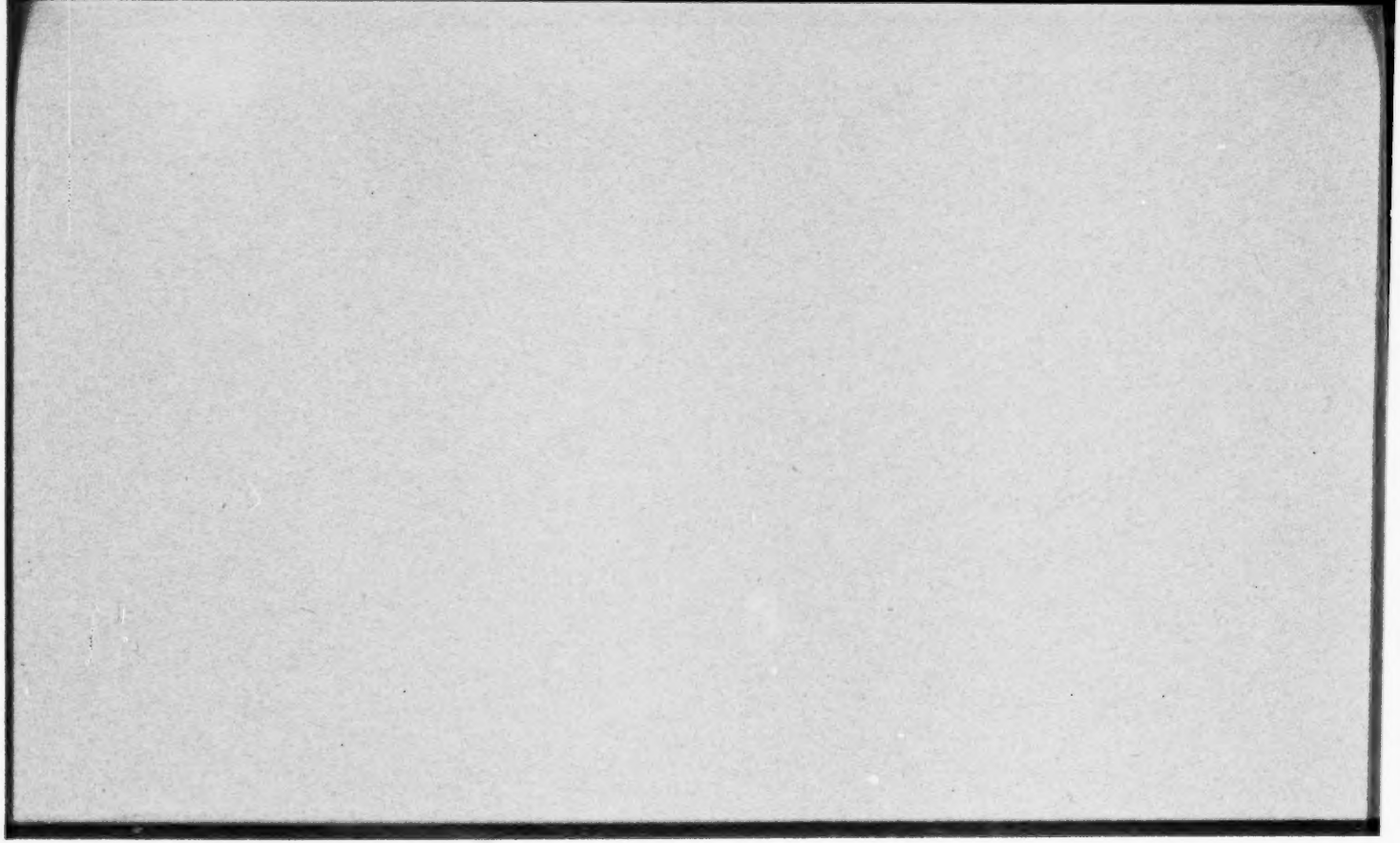
W. J. McCAIN, ROLAND M. SHELTON, ROSS RICHESIN, Sheriff of Boone County, Arkansas; EULAN MOORE, Clerk of the Circuit Court of Boone County, Arkansas and HUGH BURLISON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION AND BRIEF IN SUPPORT THEREOF

CHARLES M. HAFT,
Attorney for Petitioners.



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TO THE HONORABLE JUDGES
OF SAID COURT:

Aubrey Hickenbottom, Clarence N. Hudson, Earl E. Bonsteel, F. L. Coffman and Herbert L. Gipson petitioners, respectfully represent and show unto the court,

1. That they heretofore filed in the Chancery Court of Boone County, Arkansas a complaint on behalf of themselves and all others similarly situated to enjoin the collection of a tax to produce a fund out of which to pay benefits to employees, who are out of employment (R 1)

2. That the alleged tax is predicated upon two acts of the Arkansas Legislature.

3. That each of said acts is unconstitutional and void because each of them violates the XIV amendment to the constitution of the United States and various constitutional provisions of the constitution of the State of Arkansas and the opinion and judgment of the Supreme Court of Arkansas are evasive and in violation of the XIV amendment to Federal Constitution.

That by reason of said Federal Constitution being involved herein this court has jurisdiction of this proceeding.

4. That the trial court sustained a motion to strike and dismissed the complaint (R 13) and the Supreme Court of Arkansas sustained said action of the trial court. (R 24).

5. That owing to the Federal guaranty to the citizens of each state of a constitutional form of government and it appearing that the legislation here involved is unconstitutional and void there remains no law pursuant to which petitioners property sought to be taken as the taxes in question may be collected and hence there is no due process of law or equal protection of the law as is guaranteed to petitioners by the XIV amendment, to the Federal Constitution.

6. That prior to 1937 there existed in Arkansas, by statute a ministerial body termed the Bureau of Labor.

7. That in 1937 the legislature passed an act abolishing said Bureau and attempting to create a department to exercise certain powers of government of the state and named said department, "a Department of Labor"

in the state of Arkansas. (Section 2, Chapter 97 Popes Digest).

8. That in so far as it attempts to create a Department of Labor, said act was and is unconstitutional and void by reason of articles IV, V, VI, and VII of the Arkansas Constitution, as will more fully appear from a brief filed herein in support hereof.

9. That Section 1 of Article IV provides that all powers of government shall be divided into three departments to be known as Legislative, Executive, and Judicial.

10. That nowhere in said Constitution is a Department of Labor created or permitted.

11. That Section 1 of Article V vests all legislative powers in "a General Assembly."

12. That Section 1 of Article VI provides that the Executive Department of the State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State, and Attorney General but authorizes the General Assembly to provide for the office of Commissioner of State Lands.

13. Article VII provides how the judicial power shall be vested in certain named courts and in certain others which the General Assembly is authorized to create.

14. That the defendant, Shelton, claims to be Director of the Employment Security Division in the Department of Labor by virtue of Section 10 of the Arkansas Employment Security Act and by virtue of his appointment by the Commissioner of Labor; that there is no such office or position as Commissioner of Labor; that the defendant, Shelton, does not hold the office of Director because there is no valid law creating such office, or providing for his appointment to said office.

15. That Section 10 of the Arkansas Security Employment Act which purports to grant power to the Commissioner of Labor to appoint a Director and fix his compensation is in violation of Section 4 of Article XVI of the State Constitution which makes it the exclusive right and duty of the Legislature to fix the salary of all State officers in the State.

16. That Ross Richesin is the Sheriff of Boone County.

17. That Hugh Burlison claims to be an employee under the Arkansas Employment Security Law, as Collector.

18. That said Labor Department act being unconstitutional and void, it does not constitute due process of law and is therefore in violation of the XIV amendment to the Federal Constitution, and it denies to petitioners the equal protection of the law, in violation of said XIV Amendment.

19. That petitioners are aware of the decisions of this court, bow thereto and do not question the authority of the General Assembly of the state of Arkansas to pass a law imposing a tax to create a fund out of which to pay benefits to employees who are out of employment.

20. That section 10 of said Act 391 of 1941 reads as follows:

"Section 10. There is hereby created in the Department of Labor a division to be known as the Employment Security Division, which shall be administered by a full-time salaried director, who shall be subject to the supervision and direction of the Commissioner. The Commissioner shall appoint, fix the compensation of and prescribe the duties of the director of the Employment Security Division, provided such appointment shall be made in accordance with the provisions of Section 11 (d) of this act."

21. That in as much as said Act 391 has no existence separate and apart from "the Department of Labor" and in as much as the act creating the Department of Labor is unconstitutional and void, there is no Department of Labor in which the Employment Security Division can exist. It has no other and separate existance and consequently does not exist at all.

22. That in as much as there can be no Director of a Division which does not exist the respondent Shelton is not a Director, nor is he a Director for the further reason that he can only be such by the appointment by a Commissioner of Labor who likewise does not exist.

23. That if the acts required by Act 391 to be done by the Commissioner of Labor are to be left undone for

want of a Commissioner to do them, it leaves the act incomplete, uncertain, meaningless, ambiguous, indefinite and void; that such an act does not constitute due process under the XIV amendment to the Federal Constitution and is consequently unconstitutional and void.

24. That section 5 of Article XVI of the constitution of Arkansas exempts from taxation, "Public property used exclusively for public purposes; churches used as such, cemeteries used exclusively as such, school buildings and apparatus; libraries and grounds used exclusively for school purposes, buildings and grounds and materials used exclusively for public charity." Section 6 of Article XVI of the Arkansas Constitution provides:

All laws exempting property from taxation other, than as provided in this constitution *shall be void.*" Section 2 (6) of Act 391 attempts to exempt from taxation:

(A) Domestic service in a private home.

(B) Services performed on a farm.

(D) Services performed by an individual by his son, daughter, or spouse or by a child under the age of 21.

(H) Services performed by one in the employ of an organization exempt from the payment of income tax, under certain conditions.

(H) (2) Such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order or association.

(L) Services performed in the employ of Chambers of Commerce, base-ball clubs and civic organizations and labor unions, except those liable for tax under the Federal Unemployment Tax Act.

(M) Services performed by a student nurse or interne.

(N) Services by one delivering newspapers where the compensation is the difference between wholesale and retail prices.

(O) Services by one now or hereafter exempt under federal law.

(P) Services performed by an insurance agent working on commission.

That by reason of the exempting provisions of said section 2 (6) said act 391 is rendered entirely void.

25. That even if Act 391 were an independent act and not a branch grafted onto the Labor Department trunk, without which it has no existence, still said act is so dependent upon the Commissioner of Labor for the performance of so many acts, which if left unperformed would render the act so incomplete, indefinite ambiguous and uncertain as to render it void and not due process of law as is required by the XIV amendment to the Federal Constitution. That instances of powers and duties involving the Commissioner of Labor are,

Section 2. (i) (3) (B) Covers an arrangement pursuant to Section 18 of the Act and "the agency charged with the administration of any other State or Federal Unemployment Compensation Law."

Section 2. (2) Commissioner finds that U. S. Secretary of State has certified concerning exemptions allowed by a foreign State by employees of the U. S. government.

Section 2. (b) K. Services covered by an arrangement between the Commissioner and the agency of another State or Federal Compensation Law.

Section 2. 7. (m) (2) Time of registration fixed "except as the Commissioner may, by regulation otherwise prescribe."

Section 3. (d) The Commissioner shall compute wage credits, etc.

Section 3. (e) Notwithstanding any other provisions of this Act the "Commissioner" may by regulation prescribe what the existence of unemployment eligibility for benefits and the amount of benefits payable shall be determined, etc.

(Aside from the matter presently under discussion it will be noted that said paragraph purports to delegate to the alleged Commissioner legislative power by regulation to repeal or nullify legislation, which power is a

purely legislative function, which of course in itself renders said paragraph 3 (e) void.)

Section 3. (g) (1) Gives the alleged Commissioner authority to make determinations concerning seasonal employment and benefit rights.

Section 3. (g) (2) Commissioner to determine employment that continues substantially all of the year.

Section 3. (g) (3) Normal season of employment to be determined by the Commissioner.

Section 3. (g) (4) Commissioner to prescribe fair and reasonable rules, etc.

Section 4. Pertains to findings by the Commissioner.

Section 4. (a) Pertains to regulations prescribed by Commissioner.

Section 4. (b) Pertains to regulations prescribed by Commissioner.

Section 5 (a) Left work voluntarily if so found by the Commissioner.

Section 5. (b) Discharged for misconduct, as found by the Commissioner.

Section 5. (c) If the Commissioner finds that he has failed without good cause, etc.

Section 6. (b) Claims for benefits shall be made in accordance with such regulations as the Commissioner shall prescribe."

Section 6. (c) (2) Certain things shall be done "if so directed by the Commissioner."

Section 6. (c) (3) The Commissioner shall consider a determination only, etc.

Section 6. (c) (4) Commissioner may dispense with giving notice.

Section 6. (d) (1) The Commissioner shall provide the Board of Review, etc.

Section 6. (d) (2) Commissioner to be given notice of appeal.

Section 6. (d) (7) Commissioner may obtain a judicial review and shall be deemed a party to the proceedings. Upon filing petition for review Commissioner shall send notice to each party.

Section 6. (8) Commissioner entitled to notice.

Section 6. (e) Petition for judicial review by Commissioner.

Section 6. (f) Party receiving money by reason of fraud shall be liable to repay, in discretion of "Commissioner."

Section 6. (8) The Commissioner shall be a party entitled to notice in any proceeding, etc.

Section 6. (e) Filing petition by Commissioner for review shall not authorize Board to direct the denial of benefits.

Section 7. (a) (1) Contributions shall be payable to Commissioner.

Section 7. (c) (1) Commissioner to maintain separate account for each employer.

Section 7. (c) (2) Commissioner to establish regulations concerning joint accounts.

Section 7. (3) Commissioner to classify employers.

Section 7. (c) Commissioner to transfer retiring employers account to successor.

Section 9. (a) Unemployment Compensation Fund administered by Commissioner.

Section 9. (b) Commissioner to designate a treasurer, etc.

Section 9. (c) Commissioner to requisition funds from time to time from unemployment trust fund and in discretion of Commissioner to be redeposited in U. S. Treasury.

Section 9. (D) When unemployment trust fund of U. S. ceases to exist, Commissioner to administer the fund and may invest the funds.

Section 10. There is created in Department of Labor the Unemployment Security Division to be administered by a full time Director subject to the supervision and direction of the Commissioner who shall appoint the Director and fix his compensation.

Section 11. (a) It shall be the duty of the Commissioner to administer this Act; and he shall have power and authority to adopt, amend, or rescind such

rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations and take such other action as he deems necessary or suitable to that end, etc.

Section 11. (b) (1) General and special rules may be adopted, amended or rescinded by the Commissioner.

Section 11. (2) The Commissioner may make findings of fact and make determinations whether an employing unit constitutes an employer, etc.

Section 11. (c) Commissioner to cause copies of Act to be distributed to the public.

Section 11. (d) Commissioner authorized to appoint, fix the compensation and fix the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of his duties under this Act, etc.

Section 11. (e) Commissioner shall appoint a State Advisory Council, etc.

Section 11. (f) Commissioner shall take steps to prevent unemployment.

Section 11. (g) Each employing unit to keep such accounts as Commissioner shall prescribe.

Section 11. (h) Commissioner and others to have power to administer oaths.

Section 11. (i) Courts to have jurisdiction on application of Commissioner or others to entertain contempt proceedings.

Section 11. (j) No person shall be excused from attending and testifying before the Commissioner, etc.

Section 11. (k) In the administration of the Act the Commissioner shall cooperate to the fullest extent with the Social Security Board created by Congress.

Section 11. (l) Commissioner to prescribe regulations as to how information may be made available, etc.

Section 12. (a) (1) Commissioner to conduct an Arkansas State Employment Service.

Section 12. (2) Moneys received from Act of Congress to be paid into the Employment Security Ad-

ministration Fund and made available to the Commissioner.

Section 13. (a) Employment Security Administration Fund created and made available to the Commissioner.

Section 13. (b) Commissioner to report to Governor amount necessary to replace moneys received from the Social Security Board.

Section 14. (a) If contributions are not paid as prescribed by Commissioner they shall bear interest, etc.

Section 14. (b) In case of employer's default, suit may be brought in name of Commissioner. Commissioner may assess penalties against employers who do not file their reports on time.

Section 14. (d) Commissioner may determine whether payment of contributions or interest was erroneous. Commissioner upon proof being submitted satisfactory to him allow a transfer of contributions.

Section 14. (e) If person is delinquent it is duty of Director to assess the contributions delinquent against the employer and to certify the amount to the Commissioner, etc.

16. (d) Commissioner or his employers makes any disclosure of information in violation of the provisions of Section 11 he shall be fined, etc.

Section 17. (a) Commissioner may be represented by attorney.

Section 18. Commissioner authorized to enter into reciprocal arrangements.

Section 18. (c) Commissioner authorized to make investigations to facilitate administration of unemployment law.

Section 18. (d) Commissioner authorized to enter into arrangements whereby facilities of the Act may be utilized in making claims for benefits.

That if the court will read the fragments of the alleged Act remaining after eliminating therefrom the portions therof with the "Commissioner" inseparably connected therewith you will readily note that there is not enough remaining to constitute even a remote approach to a workable law. It follows that these remain-

ing fragments, even if severable from the alleged Labor Department Act, which they are not, because by unequivocal language grafted on to that Act and made a part and parcel of it, are a nullity.

26. Petitioners further show into the court that the decision of the Arkansas Supreme Court also the judgment of the Arkansas Supreme Court based thereon are arbitrary, evasive, unjust and in violation of the XIV amendment to the Federal Constitution in that they do not constitute the deliberate judgment or judicial determination of the court and hence are not due process of law.

27. That said judgment is in violation and defiance of articles IV, V, VI and VII of the Arkansas Constitution; also; Sections 5 and 6 of Article XVI of said constitution; also Section 4 of Article XVI of said constitution; That the judgment of said court does not constitute due process of law and does not afford to petitioners the equal protection of the law in violation of the XIV amendment to the Federal Constitution.

28. That the foregoing allegations in the two last paragraphs contained are abundantly supported and established by the opinion of said Arkansas Supreme Court in the particulars now following:

(1) Said court in its opinion says: (Record 16) "This Act 391 extends from page 1089 to page 1154, both inclusive of the acts of 1941, which shows that said court must be familiar with said act;

(2.) That again said court in its opinion says: (Record 19) "It is argued that in as much as the Act creates a Department of Labor which is placed under the supervision of an officer designated as, the Commissioner of Labor, who is charged with the enforcement of the provisions of the Act, that it is violative of the following provisions of our constitution, to-wit: Section 1, Article IV; Section 1, Article V; Section 1, Article VI; Article VII and Section 9 of Article XIX.

That in truth and in fact petitioners did not so argue in said Arkansas Supreme Court, primarily because said Act 391 does not create or attempt to create a Department of Labor.

(3.) That said Department of Labor is the subject matter of Act 161 of 1937 as appears from Section 8498 Pope's Digest.

That petitioners did argue in said Arkansas Supreme Court that said Act 161 of 1937 (the Labor Department Act) did violate the constitutional provisions referred to in the opinion of said Arkansas Supreme Court, except section 9 of Article XIX, as appears from petitioners brief filed in said supreme court of Arkansas, at pages 20 to 57 inclusive.

(4.) That said Supreme Court of Arkansas did not, in its opinion pass upon the constitutionality of said act 161 which attempted to create a Department of Labor; that in a petition for rehearing which was filed by petitioners in said Arkansas Supreme Court the attention of said court was called to the fact that no ruling was made on the constitutionality of said act 161, (Record 25) but said Arkansas Supreme Court refused to rule upon said question, as appears from its opinion and its order denying a hearing. (Record 26)

(5) That at the same page of the petition for rehearing the courts attention was called to the fact that Act 391 of 1941 does not create a Department of Labor, but said court did not modify its opinion.

(6.) That the language of the Arkansas Supreme Court recites that petitioners argued that said Act 391 violates Section 9 of Article XIX but that no such argument concerning Act 391 was made by petitioners at any time or in any way as will more fully appear from a copy of petitioners brief which petitioners now present herewith and now ask leave to file in this court, in support hereof.

(7.) That in speaking on the subject matter of Act 391 the Supreme Court of Arkansas in its opinion says: (Record 16) "all of the states have passed legislation on the subject, and it is said also that the constitutionality of such legislation has been uniformly upheld by both the state and Federal Courts at least as against such attacks as are made upon Act 391."

(a) That the fact is that no case in connection with such an Act as 391, or 161 involving such constitu-

tional provisions as Articles IV, V, VI, and VII or any or either of them, have ever been decided in any court of appellate jurisdiction except it be Stanley vs Gates 179 Ark. 886-897,8 and State vs. Martin 60 Ark. 343 which tend in a large measure to sustain petitioners contentions.

(b) That in so far as the research of counsel for petitioners developes no court of appellate jurisdiction has ever decided whether an act is void and unconstitutional in case such act is grafted onto another and the act engrafted is in large part so depend upon the other that it is uncertain, indefinite and incomplete without it and such other act is unconstitutional and void.

(c) That no court of appellate jurisdiction has ever decided whether an act denies to an employer the equal protection of the law in violation of the XIV amendment to the Federal Constitution where such act provides that no disqualification for benefits shall be made upon the employers evidence unless he notifies the commissioner of such fact, in writing, within three days after the separation of the individual from his employment but leaves the employer free to testify on the subject regardless of notice, as is provided by Section 5 (a) of Act 391.

(d) That no court of appellate jurisdiction has ever held to be constitutional and due process of law or to afford equal protection of the law a provision such as Section 6 (5) of Act 391 to the effect that a determination shall be conclusive as to an employer but not as to an employee or that a determination shall not be subject to collateral attack by an employer, but may be subject to attack by an employee.

(e) That no court of appellate jurisdiction has ever held to be constitutional as against a provision such as sections 1 and 2 of Article IV of the Arkansas Constitution a provision such as Section 8 (b) and (c) of Act 391 attempting to confer power upon the commissioner without limitation to relieve an employer from the provisions of act or bringing an employer within the provisions of the act.

(f) That no court of appellate jurisdiction has ever held to be constitutional as against such a constitu-

tional provision as Section 4 of Article XVI such a law as Section 11 (a) of Act 391.

There are however cases holding that the constitutional requirement for an appropriation is satisfied by provisions concerning payments found in unemployment acts but those cases can have no application in the case here presented by reason of Section 29 and 30 of Article V and Section 2 of Article XVI, the first of which prohibits an appropriation covering a longer period than two years. The act here involved was passed in 1941 and its effect as an appropriation has long ago spent its force. Furthermore the act cannot serve the purpose of an appropriation because by Section 10 the Commissioner is to appoint the Director and fix his compensation and by Section 11 the Commissioner is authorized to employ such persons as he deems necessary or suitable to that end. It is thus made to appear that at no time and in no way does the legislature the constitutional appropriating authority have a voice in the amount of the expenditures above mentioned.

That had said court known of any cases that were at all decisive it is quite probable that said court would have cited them as it did in its opinion in the Buckstaff case 198 Ark. 91.

(g) That no court of appellate jurisdiction has ever decided whether a provision like (5 (a)) of Act 391 violates the equal protection clause of the XIV amendment to the Federal Constitution;

(h) That no court of appellate jurisdiction has ever decided whether a provision like 6 (d) (2) of Act 391 violates the due process clause of the XIV amendment to the Federal Constitution;

(i) That no court of appellate jurisdiction has ever decided whether a provision like (6) (5) of Act 391 violates the equal protection or due process clause of the XIV amendment to the Federal Constitution.

That said Supreme Court has declined to decide questions presented to it for decision and has decided questions not presented to it for decision and in so far as it can be said to have decided any questions presented to it. its decisions are contrary to its own prior decisions of which it has taken no note in its opinion

and are also contrary to the principles of decisions of this court.

(29) Section 5 (a) of Act 391 denies to petitioners the equal protection of the law, in that it denies to employers the right to offer evidence on the subject of disqualification for benefits under circumstances under which it gives to employees the right to testify on the subject, all in violation of the XIV amendment to the Federal Constitution.

(30) Section 6 (5) of Act 391 denies to petitioners the equal protection of the law in violation of the XIV amendment, in that it permits a determination to be conclusive as to an employer and does not permit it to be conclusive under the same circumstances as to the employee.

(31) Section 8 (b) and (c) of Act 391 attempts to confer upon the "Commissioner" power to determine when an employer may cease to be subject to the act or when he may become subject to the act thereby conferring upon the "Commissioner" legislative functions in violation of Article IV of the Arkansas Constitution.

(32) That Section 5 (d) (2) of said Act 391 denies to petitioners and other employers the equal protection in violation of the XIV amendment of the Federal Constitution in that it permits an employee to refuse to work if the conditions of employment not desired by a majority of the employees in the establishment. Said provision last aforesaid does not constitute due process of law in violation of said XIV amendment.

(3) Section 6 (5) of said Act 391 denies to petitioners and other employers the equal protection of the law in violation of the XIV to the Federal Constitution, in that it makes a decision final as to them but does not make it final as to employees.

(34) That after referring to the provisions of Articles IV, V, VI, VII and Section 9 of Article XIX of the Arkansas Constitution, the court in its opinion says: (Record 19) "We will consider these objections to Act 391 collectively" (Record 20).

(35) That said court in its opinion says: "In our opinion Act 391 does not offend against any of these provisions. It does create an administrative agency,

charged with the duty of enforcing its provisions, but it does nothing more and we do not find in the provisions of the constitution above referred to or elsewhere in the constitution any inhibition against the employment of such an agency for such a purpose." That the powers attempted to be conferred upon the Commissioner are not ministerial but are executive and call for the exercise of judgment and discretion.

(36) That petitioners did not in their brief in said court contend and do not now contend, that said Act 391 did violate the constitutional provisions last aforesaid but did contend that the Labor Department Act (Act 161 of 1937) did offend against Articles IV, V, VI and VII but did not contend that it offends against Section 9 of Article XIX and did contend that Act 391 did offend against various other constitutional provisions as to which said opinion makes no rulings.

(37) That said opinion then devotes about four pages to a discussion of said Section 9 of Article XIX which is not involved in the case.

(38) Said Court in its opinion says: "It was said in the Buckstaff case supra that this legislation was enacted pursuant to the police power of the state. Having this power, the General Assembly has the right to create such offices and agencies as are necessary to its exercise."

(39) That said court fails to take note of the distinction between offices and agencies on the one hand and departments of state the creation of which is prohibited by the constitution on the other, nor does said court seem to take note of the fact that the possession of police power does not warrant the legislature in violating the constitution.

(40) That Record 23) in its opinion the Arkansas Supreme Court mentions several commissions and ministerial agencies also what the court refers to as departments but which are probably only offices, except perhaps the Banking Department as will be disclosed by a careful examination of the several acts, then as a sort of apology for its refusal to pass upon the constitutionality of the "Labor Department Act" (Act 161 of 1937) and declare it unconstitutional and void the

court says: "It would be revolutionary to declare these departments and agencies unconstitutional and would not be done if any doubt existed as to their constitutionality"; That petitioners do not contend that the legislature may not, without violating the constitution, create purely ministerial agencies and commissions to carry into office a statutory enactment but the "Labor Department Act confers upon the head of the department powers that are essentially executive and discretionary as distinguished from ministerial; that the Department created by the act is clearly an executive one in addition to that created by Articles IV and VI of the constitution.

41. Other defects, in both the Labor Department Act 161 of 1937 and the unemployment Act of 1941 from a constitutional point of view are,

1. Neither require the Commissioner to be elected whereas such requirement is imposed by Articles V, VI and VII of the Arkansas Constitution.

2. Articles VI Section 9 places the seal of state in the Governor's custody. Section 11 of the unemployment Act, 391 of 1941 places a seal in the custody of the Commissioner and requires that it be judicially noticed. Where does the legislature get the power to tell the Judicial Department what it shall do in view of Section 2 of Article IV?

Wherefore petitioners pray the court that a writ of certiorari issue out of this court directed to the Supreme Court of Arkansas;

That a hearing be had in this court upon the merits of the errors alleged in the petition filed herein:

That this court reverse the judgments of the Arkansas Supreme Court and the trial court;

That in order that constitutional government may endure in the state of Arkansas, this court remand this cause to the trial court with directions to it to enter a decree in accordance with the prayer of the complaint herein, declaring Act 161 of 1937 and Act 391 of 1941 unconstitutional and void and restraining the collection of the so called contributions referred to in Act 391 and decreeing that the monies paid by the

plaintiffs under said act be repaid to them, at least to the extent that any of said monies have not been expended, and that such other and further order be entered herein as to the court may seem meet and just.

Aubrey Hickenbottom, Clarence N. Hudson, Earl E. Bonsteel, F. L. Coffman, Herbert L. Gipson,

Petitioners,

By CHARLES M. HAFT,

Their Attorney

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(b) There is no official report, as yet of the opinion here involved, but it is reported in Hickenbottom vs. McCain 181 S. W. 2nd 226 (advance sheets No. 2).

(c) The jurisdiction of this court is invoked because violations of the Federal Constitution are involved and the opinion of the State Supreme Court, followed by judgment thereon is not a judicial determination of petitioners rights but is so arbitrary and evasive as not to constitute due process of law but conversely denies to petitioners the equal protection of the law all contrary to the Federal Consitution.

(d) A statement of the case would mean a restatement of the allegations contained in the complaint (Record 1-10) and a restatement of the allegations of the petition herein (ante). Briefly summarized however—

The General Assembly in 1941 passed Act 391 by Section 10 of which a Division in the Department of Labor purports to be created.

This act in and by itself violates the XIV Amendment to the Federal Constitution and various provisions of the State Constitution referred to in the foregoing petition and in this brief.

The Labor Department Act. (Act 161 of 1937) Sections 8498 et. seq Pope's Digest is a clear violation of Articles IV, V, VI and VII of the Arkansas Constitution, and particularly Articles IV and VI in consequence of which it is void and there is not and cannot be a law in Arkansas creating such Department. There can be only three departments by virtue of Article IV and those are created by Articles V, VI and VII of the constitution thereby putting it beyond he power of the legislature to create any department.

It follows that no Employment Security Division in the Department of Labor could be created for the lack of such Labor Department.

Had the Arkansas legislature created a ministerial commission as has been done by most states petitioners principal objection would have been removed.

The Constitution of Arkansas has by the above mentioned articles, nullified the action of the legislature in its attempt to create a fourth Department of

State, in violation of the above mentioned articles of the Arkansas Constitution.

We feel that the above mentioned propositions are unescapable and will impel a reversal at the hands of this court but, Act 391 of 1941 is in itself in violation of the XIV amendment to the Federal Constitution and various provisions of the Arkansas Constitution as shown by the foregoing (a) Subject Index.

(e) Petitioners propose to argue each and all of the errors referred to in (a) supra. If this court should sustain the first of these, it will however amount to a disposition of the entire case.

(f) There are no questions of fact involved in the case so that the foregoing statement will, we hope, give to the court a complete understanding of the issues involved.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN and HERBERT L. GIPSON

Petitioners

vs.

W. J. McCAIN, ROLAND M. SHELTON, ROSS RICHESIN, Sheriff of Boone County, Arkansas; EULAN MOORE, Clerk of the Circuit Court of Boone County, Arkansas and HUGH BURLISON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF IN SUPPORT OF THE FOREGOING PETITION

MAY IT PLEASE THE COURT:

Inasmuch as the facts are all set forth in the foregoing petition we proceed to discuss the merits of the allegations in said petition contained.

UNCONSTITUTIONALITY OF THE LABOR BOARD ACT, BEING ACT 161 of 1937.

As the court will have noted the above mentioned act was enacted to supersede a Labor Bureau act theretofore existing which made the Commissioner a ministerial officer;

The new act, if valid, makes him an executive officer.

We submit that the only state executive officer who can exist is one named in Article VI of the constitution. Nevertheless the legislature assumes to confer upon the Commissioner the broadest of executive powers.

By section 10 the Commissioner is empowered to appoint the Director who shall be subject to his supervision and direction, fix his compensation and prescribe his duties.

By section 11(a) the Commissioner is empowered to adopt amend or rescind such rules and regulations employ such persons, make such expenditures, requrie such reports, make such investigations and take such other action as he deems necessary or suitable.

The rules and regulations shall be published in such manner as the commissioner shall prescribe. He shall determine his own organization and methods of proceedure in accordance with the provisions of the act and shall have an official seal which shall be judicially noticed, amended or rescinded. By Section 11(b) rules may be adopted by the commissioner, after public hearings or opportunity to be heard thereon, on which *proper* notice has been given. Regulations may be adopted, amended or rescinded by the commissioner and shall become effective in the manner and at the time prescribed by the commissioner.

Section 11(d) reads in part, "subject to other provisions of this act the commissioner is authorized to appoint, fix the compensation and prescribe the duties and powers of such officers, accountants, attorneys, experts and other persons as may be necessary in the performance of his duties under this act. The Commissioner may delegate to any such person such power and authority as he deems reasonable and proper for the effective administration of this act, and may in his discretion bond any person handling moneys or signing checks hereunder."

Section 8503(a) Pope's Digest makes it the duty of the Commissioner to enforce all labor laws in the state of Arkansas the enforcement of which is not otherwise specifically provided for. This clearly makes him an executive officer not provided for by the constitution.

The effect of this provision is to make the Commissioner the chief executive of the state, in so far as labor laws are concerned and to that extent takes from the Govrnore his executive powers, conferred upon him by Section 7 of Article VI of the constitution, to see that the laws are faithfully executed.

We submit that this is a clear violation of section 2 of Article IV of the constitution. This constitutes additional evidence that the Labor Department act is unconstitutional and void.

We submit that it is difficult to conceive of any grants of power that would call for the exercise of more judgment and discretion than is embodied in the language above referred to.

It would seem that the legislature even abdicated some of its own powers in favor of the Commissioner in violation of Section 29 of Article IV and Section 4 of Article XVI of the State Constitution.

Insofar as appears from the opinion hreein involved the court writing it was not aware that any question was raised except that Act 391 was in violation of Articles IV, V, VI and VII and Section 9 of Article XIX whereas the fact is that no such questions were raised, but many questions were raised of which fact the opinion takes no note.

At the expense of repetition and to assure precision we again quote Section 1 of Article IV which reads: "The powers of government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to-wit:

Those which are legislative to one, those which are executive to another and those which are judicial to another, and also quote Section 1 of Article VI as follows: "The Executive Department of the State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of Statefi and Attorney General, * * *, and the General Assembly may provide by law for the establishment of the office of Commissioner of lands."

With this constitutional Rock of Gibraltar, representing as it does an impregnable wall against a fourth department, the General Assembly, in defiance of the Constitution, in 1937 attempted to pass an Act, Section 2 of which reads in part as follows:

> "A Department of Labor is hereby created and established under the supervision and direction of a commissioner to be known as the Commissioner of Labor. He shall have charge of the administration and enforcement of all laws, rules, and regulations which it is the duty of the department to administer and enforce, and shall direct all inspections except as otherwise provided." Pope,s Digest, 8498.

It will thus be readily noted that the effect of this Act, if constitutional, is to create an Executive Department. However, as has been noted, an Executive Department had already been created by the Constitution.

It is possible to interdict legislative action creating a fourth department, to pariticipate in the exercise of the State's powers of government, by any one of many expressions. The people in their omnipotence chose to employ for the purpose the words embodied in Article IV. The words so employed are wholly free from ambiguity, and no qualification or limitation can be found.

When the people by Article IV said "the powers of government of the State of Arkansas" they did not mean a part only of those powers; conversely they said and meant all of the powers of government of the State of Arkansas shall be divided into three distinct departments, each (of the three) to be confined to a separate body of magistracy. Those which are legislative to one, those which are executive to another, and those which are judicial to another.

This is accomplished by the Constitution itself. It leaves no powers of government which can by any stretch of the imagination be vested in a fourth department. The supreme law of Arkansas—the Constitution—has utilized each and all of the government's powers in the creation, *by it,* of the three named departments. Now comes one of these three named departments—the General Assembly, defies its creator—the Constitution and attempts to embark upon the department creating business, which however, is the exclusive prerogative of the people of the State of Arkansas, utilizing in so doing, an instrumentality of their own creation—the Constitution of the State which the people alone have the power to amend.

To create a Department of Labor, the people must amend het Constitution. This the General Assembly is powerless to do.

The language of Section 1 of Article IV above referred to is without qualification or limitation and seems so clearly and unequivocally to limit the departments of government in the State to three that neither argument or the citation of authorities would seem to be appropriate. Nevertheless the attention of the court, it seems, should be called to *Robert J. Boud v. Ward,* 85 Federal, where at page 35, the question now under discussion seems to be conclusively determined in the language following:

"It was the privilege and the duty of the chosen representatives of the people who framed this organic law to fix the terms of this mandate and prohibition, and to specify the exceptions to them if there were any. They made no exceptions, and that fact raises the conclusive presumption in the judicial department of government that they intended to make none, and by force of the same Constitution prohibits the court from enacting any, because their province is to interpret, but never to enact or to modify the Constitution or the laws. *Madden v. Lancaster Co.*, 27 U. S. App. 528, 540, 12 C. C. A .556, 573, 65 Fed. 188, 195; *Morgan v. City of Des Moines*, U. S. App. 593, 8 C. C. A. 569, and 60 Fed. 208; *McIver v. Ragan*, Wheat 25, 29; *Bank v. Dalton*, 9 How. 552, 528; *Vance v. Nance*, 108 U. S. 514, 521, 2 Sup. Ct. 854." (Please see this case in Fed. 390.)

It is entirely possible of course to increase this limit to four, naming the Department of Labor as such fourth department. This necessarily involves a constitutional amendment by the people of the State of Arkansas and not by the Legislature which is a child of the Constitution and not the creator of amendments to it.

Certain it is that there is now no Department of Labor. There may be a genuine necessity in the general public mind for the creation and existence of such a department.

If there is such necessity and the general public desires the establishment of such a departmentfi there is only one way to make such department possible. That one way is by means of a constitutional amendment making the departments of government four in number instead of three and making the Department of Labor such fourth department.

In no other way can we have a well organized and enduring State government, supported by the people, directed by the people, and respected by the people.

The Constitution is the only direct mouthpiece, through which the general public can speak.

This matter is rendered still more certain by Section 1 of Article VI which reads: "The Executive Department of this State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State, and Attorney General, all of whom shall keep their offices in person at the seat of government and hold their offices for the term of two years until their succes-

sors are elected and qualified, and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands." And again by Section 2 of the schedule which permits its repeal or amendment by the General Assembly.

While we have an enumeration of all of the officers in the Executive Department we observe that a Commissioner of Labor is not mentioned nor is he mentioned in any other part of the Constitution. It follows that a Commissioner of Labor is not permissible, as the Constitution now stands.

As evidence that the Constitution is the sole source from which the establishment of State offices and officers may take place, we find an exception in the language of Article VI, "and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands."

By granting to the General Assembly authority to provide by law for this one office, it, in effect, denies to the General Assembly authority to establish any other State office or officer.

The expression of one thing excludes all others.

Watkins v. Wassell, 20 Ark. 410.

Little Rock v. Clifton, 38 Ark. 205.

When at a later date it was found desirable to create a new State office the Legislature was without authority in the premises and it became necessary to amend the Constitution to provide the office of Lieutenant Governor.

VI Amendment to Constitution. This same necessity exists when it comes to providing for a department of Labor, and, the creation of the office of Commissioner in that department.

In discussing a somewhat similar matter the court in *State v. Martin,* 60 Ark. 343, at page 350, said:

> "The idea of two Governors, Secretaries of State, Treasurers, etc., is unknown in the history of the formation of State governments in this republic."

By the same token we say that the idea of two executive departments in the formation of the government in the State of Arkansas or any other State of the Union, is unknown in the history of State government.

If the General Assembly can create one department in addition to the three provided for and created by the Constitution, it may create forty departments in addition to those permitted by the Constitution and thereby nullify Articles IV, V, VI and VII of the Constitution.

There must be a limit somewhere and that limit is fixed at three by the people of the State, speaking through their only direct mouthpiece, the Constitution.

We submit that it must stay so fixed if constitutional government is to endure.

Labor affairs were well administered by a bureau acting for many years under the Governor. When the bureau was created it was evidently thought that a department was not permissible owing to Articles IV and VI of the Constitution. There has been no change in the Constitution, so far as an additional department is concerned.

In *State v. Martin,* 60 Ark. 343 in speaking of the Constitution the court at page 348 says:

"Its object is to outline the departments of government and apportion its various powers among them." In speaking of the officers of the Executive department provided for by Section 1 of Article VI the court at page 349 says:

"No one would contend that there could be more than one of each of these functionaries. * * * It would be utterly incompatible with the duties of these officers to have a divided department and a head for each. * * * For instance Sec. 2 provides: The supreme executive power of this state shall be vested in a chief *magistrate* who shall be styled, "the Governor of the State of Arkansas." * * * There can be but one chief magistrate, one commander in chief. * * * And in speaking of the legislative power the opinion continues: That soverign power being delegated by the Constitution to a general assembly it cannot create another general assembly and delegate to it the same power." So the Constitution having created an Executive Department and having delgated to it all of the State's governmental powers of an executive nature, including that of executing labor laws and affairs, the General Assembly may not take from the constitutional Executive Department the execution of labor laws and affairs and confer it upon a second Executive Department of its own creation.

This idea is emphasized by Section 7 of Article VI which provides that the Governor, "shall see that the laws are faithfully executed." This means all laws and does not admit of the Governor seeing that all laws except those pertaining to labor are executed and that another executive called a commissioner shall see to the execution of all labor laws as the Unemployment Act provides.

A fourth department styled, the Department of Labor or any other appellation, is abhorrent to the Constitution, unless and until it is amended to encompass a fourth department.

The Commissioner of Labor, or any other fourth department head is abhorrent to the Constitution.

Until the Constitution is amended or in lieu thereof our system of mathematics, which has endured for centuries, is so revolutionized as to treat as a true equation,

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the General Assembly is powerless to enact a law creating a fourth department of the State.

The effect of the judgment of the Supreme court herein is to approve of the above mentioned false equation. Said judgment is erroneous in so doing and we respectfully submit that it should be reversed.

"Those which are executive to another" cannot without doing violence to reason and at the same time maltreating the English language, be said to admit of the executive powers of government being vested in two departments—one the creature of the Constitution and the other the result of legislative action. Inasmuch as the Constitution, which is the supreme law to which all legislative action is subordinate, itself divides the powers of government into three distinct departments, naming each of the three, and then names the officers who shall exercise the powers of each of said departments, *all of the powers of government* are employed and vested in those so named. It follows that there are no powers left for the Legislature to vest in a second other executive department, even if the Lgislature were permitted to create a department of government known as the Labor Department instead of being prohibited from so doing. Two executive departments are abhorrent to the Constitution. "Another" is clearly a singular noun and does not admit of two executive departments.

In *Staney v. Gates*, 179 Ark., at page 897, the court says:

> "The Constitution defines the duties of each department of government." * * *

It is as clear as the light of day that the Constitution does not define the duties of a Department of Labor. Had there been such a department the Constitution would have defined its duties as it did those of the three departments actually existing. The unescapable inference is that it was not intended that a Department of Labor should exist.

Again at page 898 the court says:

"The three departments of government are of equal dignity and no one of them can encroach upon the other." We here have a clear statement by the Arkansas court itself that the constitution limits the departments of government to three.

Since the rendition of the above mentioned opinion, Article IV of our Constitution, which created those three departments and defined the duties of each of them has not been amended. It results that today we have three departments of government and only three, all of which are created by said Article IV—the Legislature, a child of the Constitution to the contrary notwithstanding.

Not infrequently some executive, some legislative body or some court becomes imbued with the idea that some constitutional provision is old fashioned and should be done away with, without the delay required to bring about a constitutional amendment. The fundamental basis upon which American government is predicated is tossed aside and an attempt is made to abandon the idea of a government for, by, and of, the people, resulting in effect in an attempted judicial or legislative amendment of the Constitutino, a shining example of which is the legislative attempt to create a fourth department called the Department of Labor.

Let us either abide by the Constitution, or amend it if a change is desired.

We are not unmindful of what the Arkansas Supreme Court has said in *Buckstaff Bathhouse Co. v. McKinley*, 198 Ark. 91, and *McKinley v R. L. Payne & Sons*, 200 Ark. 1114. Speaking now of the first mentioned case.

The bathhouse in question was erected on a reservation of the federal government and it was contended for that reason the State of Arkansas was without authority to collect the unemployment tax in question, notwithstanding that the consent of the United States was given the State to tax, as personal property, all structures and other personal property in private ownership within the reservation.

The bathhouse company also contended that it was an instrumentality of the United States government engaged in the distribution and conservation of medicinal waters of their reservation.

At page 94 the opinion reads:

"It is further urged that collection of the tax or contribution would be violative of Article IV, paragraph 3 of the Constitution of the United States."

At page 96 the opinion reads:

"The three questions for determination are:

"(1) Did the federal government authorize the State to assess and collect taxes of the character herein discussed?

"(2) Is appellant a government instrumentality or agency and therefore excused?

"(3) Are appellants' employees independent contractors?"

At page 99 the opinion reads:

"Although constitutionality of the Arkansas statute is not directly questioned in the appeal before us, this is the first case reaching this court in which payment of the tax is involved. Necessarily, if we hold that appellant must pay the State's demand, we have upheld the validity of Act 155. For this reason the decisions quoted have been cited."

The court at page 98 quotes from the Carmichael case and from the Davis case, but there is nothing in the language quoted that in the slightest degree militates against the principle points which we here present. This court evidently had no thought of and made no mention of the Act creating the *Department* of Labor onto which Act 155 is by Section 10 of said Act grafted and made a part so that it has no independent existence apart from the Labor Act.

The opinion in the Buckstaff case makes no mention of Articles IV, V, VI and VII or Sections 5 and 6 of Article XVI of the State Constitution or the XIV Amendment to the Federal Constitution, or any of them or any part of any of them.

There was no necessity for the court to make any mention in the Buckstaff case of the State Constitution or any portion of the Federal Constitution other than Section 3 of Article IV of the Federal Constitution.

It is perhaps unfortunate that said court at page 99 did not limit what is said to Section 3 of Article IV of the Federal Constitution when the opinion speaks about upholding the validity of the Act.

Certainly said court did not intend to decide or adjudicate upon any other constitutional question, because none was raised or argued. What said court evidently did and intended to do or at least should have done was to indulge in the well-established presumption that all legislative acts are constitutional until the contrary is made to clearly appear.

We submit that there not only was not but could not be any decision or adjudication, in a legal sense, upon any constitutional question other than pertained to Section 3 of Article IV of the Federal Constitution.

Even if it had been otherwise, as we shall presently see, there is still no reason why such decision should continue to prevail, if, as we think we have abundantly demonstrated in the opening pages of this brief such decision would clearly have been erroneous.

The court did not pretend to pass upon the constitutionality of the Act in question or any portion of it from the viewpoint of any Federal or State particular provision. Clearly the court did not even have in mind Articles IV, V, VI and VII or any or either of them. Apparently the court cimply made a passing remark calculated to dispense with thee discussion or decision of any particular question or questions, especially in view of the fact that the parties had not briefed any constitutional question and it would be a rank injustice to dispose of a litigant's constitutional rights without giving him a full opportunity to be heard. It is perhaps unfortunate that the court did not simply say that every statute is presumed to be constitutional until the contrary is clearly established and we therefore indulge in that preusmption without saying anything of a constitutional nature, because that is in reality what the court concsiously or unconsicously did.

Clearly the law is that all statutes are presumed to be constitutional until the contrary is made to appear.

Grear v. Merchants, 114 Ark. 212.
State v. Moore, 76 Ark. 197.
Stillwell v. Jackson, 77 Ark. 250.
State v. Hodges, 114 Ark. 155.
Adams v. Spellyard, 178 Ark. 614.
Botony v. U. S., 278 U. S. 282.

At most, however, what is said by the court in *Buckstaff v. McKinley* is purely *obiter dictum.*

Rush v. French, 1 Ariz. 99.
In re *Woodruff,* 96 Fed. 317, 321.
State v. Clark, 3 Nev. 566, 572.
State v. Brown, 181 La. 704.
Chandler v. Roes, 80 F: (2d) 407:
San Pedro v Los Angeles, etc., 179 Pac: 390.
Buyers v. Comer, 50 Ariz. 8.
Lynch v. Hill, 2 Atl. (2nd) 614.
House, etc., v. Industrial, etc., 6 A. L. R. 540
In re *Murphy's Estate,* 99 Mont. 114.
Brekke v. Crew, 43 S. D. 406.
Commercial v. Christy, 294 Fed. 212.
Sidney v. Commissioners, 188 N. C. 30.

In *McKinley v. R. L. Payne & Son,* 200 Ark. 1114, at page 1121, the court says:

"This question has been decided many times by this court, but the constitutionality of this particular Act was definitely settled by the case of *Buckstaff Bathhouse Co. v. McKinley, Comrs, supra.*" (198 Ark. 91)

It is thus to be observed that without giving to the constitutional questions raised in 200 Arkansas 1114 any primary or specific consideration they are overruled on the strength of the obiter dictum found in 198 Arkansas 91.

In McKinley v. Payne, 200 Ark. 1114, the appellant raised no question based on the State Constitution. All questions raised were based on the V and XIV amendments to the Federal Constitution.

So far as the Federal questions are concerned they were not raised or argued in the Buckstaff case in 198 Ark., and in the Payne case in 200 Ark. they were disposed of on the strength of the *obiter dictum* contained in the Buckstaff case and we submit should receive a full hearing in this case, for the first time.

Petitioners here ask and only ask the best judgment of this court upon the merits of the questions presented by this brief. Surely this court will not deny to them that consideration because of anything said in either of the Arkansas opinions last above referred to.

What we intended to be an exhaustive search has failed to reveal to our attention any case where there was presented for the consideration of this court the constitutional question of the

validity of either the Labor Act or the Employment Security Act predicated upon Articles IV, V, VI, VII or Sections 5 and 6 of Article XVI of the State Constitution. We therefore say unhesitatingly that those questions are presented to this court for the first time.

In view of this situation we submit that it is impossible for any prior decision of the Arkansas court to be *stare decisis* because there is no decision of said court upon any of said questions.

THE MATTERS INVOLVED IN PARAGRAPHS 26, 27, AND 28 OF THE PETITION

The Court may recall that the allegations referred to in the above captions pertain to the arbitrary and evasive nature of the opinion of the Arkansas Supreme Court To save repetition we again invite the attention of the Court to the details of said allegation as found in the foregoing petition, at pages 10 to 13 inclusive.

In this connection the court will also note that on the subject of the right of the legislature to create the Department of Labor by Act 161 of 1937 the State Supreme Court is discretely silent. The nearest approach to the subject is found in the opinion (R23) where, after basing the passage of the act on the police power the court says, "Having this power the General Assembly has the right to create such offices and agencies as are necessary to its exercise."

This language standing alone, as it does is, in view of the Constitutional issues here involved is very confusing and meaningless. The statement is quite incomplete unless it is limited to agencies and offices, not prohibited by the Constitution. If limited to such as are not prohibited by the constitution it is true. If it is read without limitation it is false.

A stranger to the case would naturally read the courts language to mean that any office or agency might be created by the General Assembly which it might elect, in which case the statement is not correct.

The big question for decision in this case is: In view of Articles IV, V, VI and VII of the Constitution can the General Assembly create a Department of Labor. The language above quoted on its face answers the question, "Yes". The constitution answers it, "No."

We submit that the opinion is so clearly arbitrary and

evasive as to require little or no argument upon that subject and we therefore address our discussion to the consequences that ensue when an opinion is found to be clearly arbitrary and evasive as this court has heretofore stated such consequences. This Court has repeatedly held that there is no case of evasion of constitutional questions you do accept as final the ruling of the State Court on all matters of State law as held for instance in Fox River vs Railroad Commission 264 US 651. But in the opinion of the Arkansas Supreme Court involved in this proceeding we have no ruling or Judicial determination but conversely only statements that are evasive and arbitrary expresions that do not amount to a judicial determination and do not constitute due process of law from the viewpoint of the 14th amendment to the Federal Constitution. In these instances this Court in Ward vs Love 253 US 17 page 22 said:

"Whether the right was denied or not given due consideration by the Supreme Court is a question as to which the Claimants were entitled to envoke our judgment and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-federal grounds of decision that were witthout any fair or substantial support." The opinion then cites in support of what this Court said as above quoted.

Union, etc. vs Public, etc., 248 US 67, Leather, etc. vs Thomas etc., 207 US 93. Vandalia, etc. vs Southbend 207 US 359, 67. Garr vs Shannon 223 US 468. Crestwell vs Knights, etc., 225 US 246, 16. Enterprise, etc., v sFarms, etc., 243 US 157, 64. Jefferson vs Skelly 1 Black 436, 43. Huntington vs Atrill 146 US 657-83, 4. Boyd vs Thayer 143 US 135,180. Carter vs Texas, etc., 127 US 442, 47. The opinion then continues. "Of course as non federal grounds plainly untenable, may be thus put forward successfully, our power to review may easily be avoided. Terra Haute vs Indiana 194 US 579, 89." In the case from which we have just quoted the State Court held that the taxes in question had been paid voluntarily this Court held that the circumstances under which the taxes were paid amounted to coercion.

In the case here presented Your Honors will have well noticed that the State Constitutional Provisions embodied in Aricles IV, V, VI, VII of the State Constitution are to plain admit of any honest difference of opinion. By Article IV plainly

all of the powers of State Government are divided into and limited to three departments of Government the Legislative, Executive and Judicial and the Constitution then proceeds to carry into effect the provisions of Article IV by placing the powers to be exercised by each of the three named departments in certain officers therein named in each instance, except in the case of the Judicial Department where the Constitution gives to the Legislature express authority to create Courts in addition to those named in the Constitution and the Arkansas Supreme Court recognizes such situations and expressly states in early opinions the effect of these Constitutional Provisions. As the State Court said in State vs Martin 60 Arkansas 343-50 the idea of two Governor's, Secretary's of State, Treasurers, etc. is unknown in the history of the formation of State Governments in this Republic. Article VI creates the office of Chief Executive and gives him the title of Governor. And by Section 7 Article VI he is charged with the faithful execution of all State laws. In the face of this situation the Legislature sees said to attempt to create another executive department called the Department of Labor and places the head and of each Chief Executive a Commissioner. The Legislature then takes away from the Governor some of the powers given to him to execute all laws and gives those powers to Commissioner of Labor who is by Legislative Act given ful power to enforce all laws pertaining to labor a power which in the absence of a *valid* statute is vested into Governor, by the constitution.

Again the Arkansas Supreme Court reads Article IV, V, VI, VII, of the Constitution as we respectively submit they should be read and in the case of Stanley vs Gates 170 Arkansas 897 Page 897 says, "The Constitution defines the duties of each department of Government." And then proceeds to emphasize that in Arkansas there are but three departments of government and in so doing at page 898 says: "The three departments of government are of equal dignity and none of them can encroach upon the other.'

Although these two cases that are above referred to were cited in our brief in the State Court the opinion takes no note of them. This Court again spoke upon the subject of its duty under circumstances here presented and in Lawrence vs State 276 US 281 Page 281 says, "But the Constitution which guarantees rights and imminuties to the citizen, likewise insures him the privilege of having those rights and imminuties judicially

declared and protected when such judicial action is properly envoked. Even though the claimed Constitutional protection be denied on non-federal grounds it is the province of this Court to inquire whether the decision of the State Court rests upon a fair and substantial basis. If unsubstantial, Constitutional obligations may not be thus avoided."

We respectfully submit that rarely, if ever, has a case been presented to this court calling so loudly for your judicial intervention in furtherance of Justice and the maintainance of constitutional rights, of a multitude of Arkansas taxpayers.

THE SO-CALLED ARKANSAS EMPLOYMENT SECURITY LAW IS UNCONSTITUTIONAL, UNCERTAIN, INDEFINITE, INCOMPLETE AND VOID

No doubt if the Labor Department Act is void, counsel will concede that the Arkansas Employment Security Law is also void, particularly in view of the fact that Section 10 of the Employment Act reads, "There is hereby created *in the Department of Labor* a division to be known as the Employment Security Division," etc.

The Legislature attempted to pass the so-called, "The Arkansas Employment Security Law," Section 10 of which reads in part:

"There is hereby created in the Department of Labor a division to be known as the Employment Security Division which shall be administered by a full time salaried Director who shall be subject to the supervision and direction of the Commissioner. The Commissioner shall appoint, fix the compensation of, and prescribe the duties of the director of the Employment Security Division, provided that such appointment shall be made in accordance with the provisions of Section 11 (d) in this Act."

It is thus made abundantly plain that the only existence of the Division is as a part and parcel of the Labor Department. The Division is a branch grafted on to the Labor Department trunk and has no existence separate and apart from the trunk—but as we have already seen there is no trunk (Labor Department). It follows that there can be no branch or Division and the Employment Security Division falls along with the Labor Department Act.

But the foregoing is only one of the insurmountable obstacles encountered by the would-be Unemployment Security Act. The Commissioner of Labor is made such an indispensable

factor in said Act, that with the Commissioner eliminated, if there were one, which there is not, nothing whatsoever could be accomplished by the emasculatd skeleton remaining.

What we have under the last caption herein stated will, we submit be abundantly verified by allegations contained in the foregoing petition (pages 5 to 9) as to the activities which Act 391 calls upon and authorizes the Commissioner to perform.

If the court will read the fragments of the alleged Act remaining after eliminating therefrom the portions thereof with the "Commissioner" inseparably connected therewith you will readily note that there is not enough remaining to constitute even a remote approach to a workable law. It follows that these remaining fragments, even if severable from the alleged Labor Department Act, which they are not, because by unequivocal language grafted on to that Act and made a part and parcel of it, are a nullity.

It follows that this fragmentary alleged Act is unconstitutional. It is void because it is incomplete, indefinite, and uncertain, and does not constitute due process of law in violation of the XIV Amendment to the Federal Constitution.

Mahew v. Nelson, 346 Ill. 381.
Cline v. Frink, 274 U. S. 445.

SECTION 2 (6) AND EACH AND EVERY PART THEREOF IS IN VIOLATION OF SECTIONS 5 AND 6 OF ARTICLE XVI THEREBY RENDERING THE ENTIRE ACT VOID

The above mentioned section provides in part and in substance.

The term employment shall not include—

(A) Domestic service in a private home.

(B) Services performed on a farm.

(D) Services performed by an individual by his son, daughter, or spouse or by a child under the age of 21.

(H) Services performed by one in the employ of an organization exempt from the payment of income tax, under certain conditions.

(H) (2) Such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office,

or is ritualistic service in connection with any such society, order or assocation.

(L) Services performed in the employ of Chambers of Commerce, base-ball clus and civic organizations and labor unions, except those liable for tax under the Federal Unemployment Tax Act.

(M) Services performed by a student nurse or interne.

(N) Services by one delivering newspapers where the compensation is the difference between wholesale and retail prices.

(O) Services by one now or hereafter exempt under federal law.

(P) Services performed by an insurance agent working on commission.

Section 6 of Article XVI provides:

"*All laws* exempting property from taxation other than as provided in this Constitution *shall be void.*"

It is to be noted that a violation of the last mention provision of the Constitution renders that entire law void and any saving clause embodied in an Act by the General Assembly cannot rescue the otherwise valid part of such *void law.*

Section 5 of Article XVI exempts the property following:

"Public property used exclusively for public purposes; churches used as such, cemeteries used exclusively as such, school buildings and apparatus; libraries and grounds used exclusively for school purposes, buildings and grounds and materials used exclusively for public charity."

The General Assembly studiously avoided the word exempt or any of its derivatives in the above mentioned section; nevertheless, it is as clear as the light of day, when at noon there is a cloudless sky, that the sole purpose of said section is to exempt from the force of the Act the various persons and services in said section named and described.

In *Tedford v. Vaulx,* 183 Ark. 240, the court at page 242 says:

> "All property in this State is subject to taxation except that specifically exempt from taxation by the Constitution. Section 5, Article XVI of the Constitution."

We submit that the above captioned proposition is estab-

lished beyond controversy by the very terms of the section itself and ask the court to so hold.

We submit that regardless of legislative action, the Constitution creates the exemptions therein specified and to make sure that those exemptions and no others shall prevail; the Constitution renders all acts attempting to create other exemptions void.

SECTION 5 (a) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT

Section 5 (a) provides that no disqualification for benefits shall be made upon the employer's evidence unless he notifies the Commissioner of such fact, in writing, within three days after the separation of the individual from his employment, but it leaves the employee free to testify, regardless of notice.

We submit that this situation is as pronounced a violation of the equal protection provisions of the XIV Amendment as can be conceived of. It clearly denies to the employer the equal protection of the law.

The employee is more apt to know when he quits than is the employer especially in a plant where the employees are numerous.

It is much easier for one employee to give one notice than it is for one employer to give notice of twenty separations.

SECTION 6 (4) IS IN VIOLATION OF THE XIV AMENDMENT AND IS VOID

Said provision assumes to dispense with both common-law and statutory rules of evidence.

We are sure that opposing counsel will admit the existence of the well-established rule of law, that all existing laws in so far as applicable are written into every contract. This certainly includes the law of evidence in existence at the time.

Certainly both employer and employee desire to know when entering into a contract what the law of evidence is that may control any controversy that may arise during the existence of such contract. It is these rules of evidence that the provision in question provides shall not prevail.

Section 5 (7) provides for a judicial review of a decision of the Board of Review in the Circuit Court of Pulaski County, and further provides that a transcript of the evidence taken before said Board shall be filed in said court. Said sub-section then reads:

"No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board of Review, and the Board may, after hearing such evidence, modify its findings of fact or conclusions and file such additional or modified findings and conclusions, together with a transcript of the additional record, with the court."

It is to be noted that the alleged act does not authorize the court to disregard or direct the Board to disregard any evidence which the Board had received and given weight in flagrant violation of well-established rules of evidence.

We further submit that the said sub-section is a plain attempt on the part of the General Assembly to dictate to the court what evidence it may or may not receive in considering appeals from the Board of Review, in violation of Sections 1 and 2 of Article IV of the State Constitution.

SECTION 6 (d) (1) DOES NOT AFFORD TO THE EMPLOYER THE EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE XIV AMENDMENT TO THE FEDERAL CONSTITUION

Said provision permits the *Commissioner* to dispense with notice of determination, to an employer but requires that it be given to the employee.

Said provision provides that the employer shall not have notice, if he has failed to give notice that he was claimant's employer, prior to the determination, if and as required by regulation of the Commissioner. However, the emplyee is not subjected to any similar treatment. He certainly knows who employs him. He can certainly keep track of one employer better and more readily than an employer can keep track of forty employees, and notice can be given much more readily than forty.

We submit that this provision does not afford the employer the equal protection of the law; that it violates the XIV Amendment to the Federal Constitution and is void.

That it is submitted is a clear violation of the equal protection of the law.

Atchison v. Mathews, 174 U. S. 96.
St. Louis v. Winn, 224 U. S. 354.
M. & St. L. v. Kennedy, 232 U. S. 626

The parties, employer and employee, are identically situ-

ated and we submit under the XIV Amendment should be equally protected.

SECTION 6 (5) IS LACKING IN DUE PROCESS OF LAW AND DENIES TO THE EMPLOYER THE EQUAL PROTECTION OF THE LAW

Section 6 (5) reads in part:

"Subject to appeal proceedings and judicial review as provided in this section, any determination, redetermination or decision as to the rights to benefits, shall be conclusive for all of the purposes of thisAct and shall not be subject to any collateral attack, by any employing unit, irrespective of notice."

There are two noteworthy matters in the language quoted:

1. Any determination shall be conclusive as to the employer only.

2. The determination shall not be subject to collateral attack by any employing unit, irrespective of notice—but is subject to collateral attack by the employee.

We take it that in order to be bound by a determination a person must have notice and a chance to be heard, is a proposition too well-established to require the citation of authorities in this court.

There is one case so squarely in point that we feel we would be quite derelict if we did not call it to the court's attention. In *Turner v. Wade,* 254 U. S. 64, 70, the court said:

> "We are therefore unable to find in the decisions of the Supreme Court of Georgia that that court understood paragraph 7 to provide for the notice and hearing required by due process of law. Therefore looking into the section of the statute for ourselves, we are forced to the conclusion that reading the provisions together, being parts of one and the same Act, they clearly show that the Board of Appeals was not required to give any notice to the taxpayer nor was opportunity given him to be heard as of right before the assessment was finally made against him.
>
> "In the present case the taxpayer objected to an assessment without notice. The case comes within *Central Georgia v. Wright,* 207 U. S. 127. The court held that the statute as construed by the Supreme Court of the State of Georgia does not afford the taxpayer due process of law."

SECTION 8 (b) AND (c) ARE IN VIOLATION OF SECTIONS 1 AND 2 OF ARTICLE IV OF THE STATE CONSTITUION

Under the provisions above mentioned, an employer cannot cease to be such, so far as the alleged Act is concerned, except in accordance with the regulations which the General Assembly, under the Constitution is alone empowered to prescribe but which it attempts to delegate power to the Commissioner to determine by regulations, all in violation of Section 1 of Article IV of the Arkansas Constitution.

These sub-sections provide that an employer may become subject to the Act or may cease to be subject to it with the written approval of the Director and subject to regulations made by the Commissioner.

We submit that it is for the legislature to fix the conditions upon which a man comes under the act. It may be left to the Commissioner to determine whether a man has complied with conditions but not to prescribe the conditions. The act constitutes a delegation of legislative power in violation of Article IV of the state constitution.

Under *Yick Wo v. Hopkins,* 118 U. S. 356, these provisions are unconstitutional and void.

SECTION 11 (a) IS IN VIOLATION OF SECTION 4 OF ARTICLE XVI AND IS VOID

Section 11 (a) provides in part:

"It shall be the duty of the Commissioner to administer this Act; and he shall have power and authority to adopt, amend or rescind such rules and regulations *to employ such persons, make such expenditures,* require such reports, make such investigations and take such other action *as he deems necessary or suitable to that end.* Such rules and regulations shall be effective upon publication, in the manner not inconsistent with the provisions of this Act, which the Commissioner shall prescribe."

Section 4 of Article XVI of the Arkansas Constitution provides:

"The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law to any officer, employee, or other person, or at any rate other than par value; and the number and salaries of clerks and employees of the different departments of the State shall be fixed by law."

Section 2 of Article XVI provides:

"The General Assembly shall from time to time provide for the payment of all just and legal debts of the State."

We thus observe that by Section 11 (a) of the alleged Act the alleged Commissioner of Labor is authorized to do what by the Constitution is required to be done by the General Assembly. One or the other must fail.

The Constitution is supreme, and the statute is subordinate to it. The result is that the statute must fall.

We further submit that said proposed procedure is lacking in due process of law and therefore in violation of the XIV Amendment to the Federal Constitution.

We respectfully submit that for the several reasons therein stated the prayer of the petition for certiorari should be granted and that a hearing be had in this court upon the merits of the case.

CHARLES M. HAFT,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN AND HERBERT L. GIPSON ..... *Petitioners*
(Appellants Below)

vs. No. 576

W. J. MCCAIN, ROLAND M. SHELTON, ROSS RICHESIN, *Sheriff of Boone County, Arkansas;* EULAN MOORE, *Clerk of the Circuit Court of Boone County, Arkansas, and* HUGH BURLISON ..... *Respondents*
(Appellees Below)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF

GUY E. WILLIAMS,
Attorney General for the State of Arkansas.

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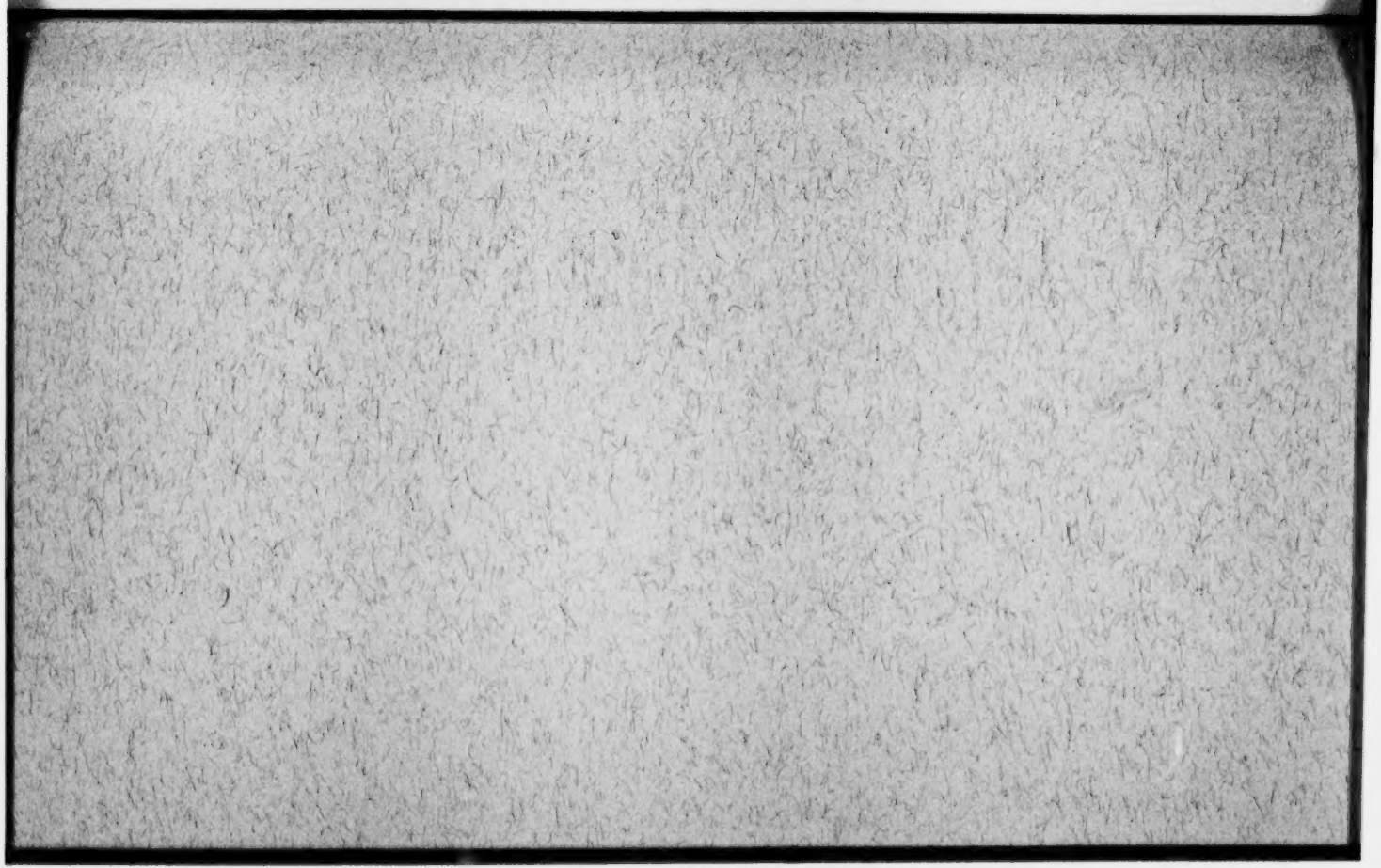

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

W. J. McCain and Roland M. Shelton, respondents, appellees below, for their response herein state:

First. That the petition for certiorari filed herein should be denied for the reason that the record filed with the petition shows that the judgment in this case was entered on the 19th day of June, 1944, (r. 24), that the petition for rehearing was denied on July 10, 1944, (r. 26), more than

three months having elapsed under the rule used for computation, and this court is without jurisdiction to grant the petition.

Second. The petition filed herein should be denied for the further reason that no substantial federal question is presented.

Third. That said petition should be denied because the question attempted to be presented is unsubstantial and frivolous and cannot be made substantial so as to serve as a basis of the exercise of appellate jurisdiction of the Federal Supreme Court over a State Court.

Fourth. In paragraph two of the complaint, petitioners, who were appellants below, allege that certain acts of the Arkansas Legislature creating the Department of Labor were null and void for the reason that said acts were in violation of Articles IV, V, VI, and VII of the Constitution of the State of Arkansas (r. 1-2). In Section III of their complaint they allege that the Arkansas Employment Security Act violates Section 4 of Article XVI of the Constitution of the State of Arkansas. None of the foregoing allegations present any Federal question, but only present questions of local laws over which this court has no jurisdiction; therefore, the petition insofar as the questions presented in these allegations should be denied.

Fifth. Petitioners following the above allegations in their complaint allege that certain sections of the Arkansas Employment Security Law, which is Act 391 of the General Assembly in Arkansas of 1941, violate the Fifth and Fourteenth Amendments of the Federal Constitution as well as certain provisions of the Constitution of the State of Arkansas. These allegations do not present a substantial Fed-

eral question for the reason that said question raised has been explicitly foreclosed by decisions of this Court in the case of *Carmichael* v. *Southern Coal & Coke Company,* 301 U. S. 495, 81 L. Ed. 1245, and in the case of *Buckstaff Bath House Company* v. *Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas,* 308 U. S. 358, 84 L. Ed. 322. Said petition should, therefore, be denied.

WHEREFORE, respondents pray that the petition for certiorari filed herein by petitioner be denied and for all other proper relief to which they may be entitled.

GUY E. WILLIAMS,

Attorney General for the State of Arkansas.

IN THE

Supreme Court of the United States

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(*Appellees Below*)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF IN SUPPORT OF THE FOREGOING RESPONSE

PART I

The first allegations in petitioner's complaint and in their petition filed herein are made with respect to the constitutionality of the Labor Board Act, being Act 161 of the General Assembly of the State of Arkansas for the year of 1937. They complain that the Supreme Court of Arkan-

sas erroneously held that said act of the Legislature did not violate any of the provisions of the Constitution of the State of Arkansas, but whether or not the Supreme Court was correct in its holding is not a question that can be reviewed by this Court as the question presented was a question of local law over which this Court has no jurisdiction. This Court will accept as controlling a decision of the State Courts on questions of local law, both statutory and common.

This Court in the case of the *First National Bank of Garnett* v. *Ayers,* 160 U. S. 660, 40 L. Ed. 573, said:

> "We are asked to go into the proper construction of the state statute and its validity under the state constitution. But these are questions of local law, the decision of which by the Supreme Court of the state is controlling."

Again, this Court in the case of *Carstairs* v. *Cochran,* 193 U. S. 10, 48 L. Ed. 596, said:

> "The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court."

Again, this Court in the case of *Smith* v. *Jennings,* 206 U. S. 276, 51 L. Ed. 1061, said:

> "The conformity with the state constitution of the proceedings of the state legislature in the enactment of a law is not a federal question which will sustain a writ of error, but is a question upon which the determination of the state court is final."

This Court again in the case of *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 50 L. Ed. 170, said:

"The federal Supreme Court has no power to review a decision of a state court which puts upon a state statute a construction which removes every question of constitutionality from it 'and seems to us reasonable even if a somewhat different one could be conceived.' "

From the decisions here cited and many others which might be cited in support thereof, it is shown that this Court has no jurisdiction insofar as the complaint made by petitioners that either of the Acts complained of violate the Constitution of the State of Arkansas, and, accordingly, the petition will be denied.

PART II

Constitutionality of Act 391 of the General Assembly of the State of Arkansas for the Year 1941

Petitioners next complain of Act 391 of the Acts of the General Assembly of the State of Arkansas for the year of 1941, which Act is known as the "Employment Security Act" and superseded Act 155 of the Acts of 1937 and Act 200 of the Acts of 1939 of the General Assembly of the State of Arkansas, which the Supreme Court of Arkansas in its opinion (r. 16) stated that an attack upon Act 391 would have been equally applicable to the question of the validity of the prior Acts.

The question of the validity of Act 155 of the Acts of 1937 was in question in this Court in the case of *Buckstaff Bath House Company* v. *Ed I. McKinley*, 308 U. S. 358, 84 L. Ed. 322. This Court affirmed the decision of the Supreme Court of Arkansas upholding the validity of the Act in question.

Again, this Court in the case of *Carmichael* v. *Southern Cole & Coke Company*, 301 U. S. 495, 81 L. Ed. 1245, had before it the question of the validity of the Unemployment Compensation Act of the State of Alabama and whether or not said Act infringed the due process and equal protection clauses of the Fourteenth Amendment. In this case every question was raised questioning the constitutionality of the Alabama Act (which is insofar as the questions raised here identical with the Arkansas Employment Security Act), and in this case the Court upheld the validity of the Alabama Act and decided every meritorious question raised by petitioners here adversely to the petitioners. The *syllabi* of said case follows:

> "2. A state statute which imposes upon employers the obligation to pay a certain percentage of their monthly payrolls into the state unemployment compensation fund is an exercise of the taxing power of the state.
>
> "3. Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use, but may likewise be laid on the exercise of personal rights and privileges.
>
> "4. Freedom to select subjects of taxation and to grant exemptions is inherent in the exercise of the power to tax.
>
> "5. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation, and inequalities which result from the singling out of one particular class for taxation or exemption infringe no constitutional limitation.
>
> "6. The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis.

"7. Exemptions from the operation of a tax must be presumed to rest on a rational basis if there is any conceivable state of facts which would support it.

"9. Administrative convenience and expense in the collection or measurement of a tax may constitute a valid basis for exemption therefrom.

"11. Where the public interest is served, one business may be left untaxed and another taxed in order to promote the one, or to restrict or suppress the other.

"15. While, since the adoption of the Fourteenth Amendment, state taxing power can be asserted only to effect a public purpose and does not embrace the raising of revenue for private purposes, the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest.

"16. The public purpose of a state for which it may raise funds by taxation embrace expenditures for its general welfare.

"17. Whether an expenditure of public money serves a public purpose is a practical question addressed to the lawmaking department and a plain case of departure from every public purpose which can reasonably be conceived is required to justify the intervention of a court.

"19. If the purpose of an expenditure of public money is legitimate because public, it will not be defeated because the execution of it involves payments to individuals.

"21. The restriction of the benefits of an unemployment compensation law to the employees of those subject to the tax imposed by the law, which is exacted only from the employers of eight or more persons for 20 or more weeks in the year, other than those who employ agricultural laborers, domestic servants, seamen, insur-

ance agents or close relatives, and charitable institutions interstate railways, and the government of the United States or of any state or political subdivision, is not so arbitrary and discriminatory as to infringe the Fourteenth Amendment and deprive the statute of any public purpose.

"22. In establishing a system of unemployment benefits, the legislature is not bound to occupy the whole field, but may strike at the evils of unemployment where they are most felt, or where it is most practicable to deal with them, and may exclude persons whose need is less or whose effective aid is attended by inconvenience which is greater."

Therefore, in the light of these decisions of this Court, the allegations made by petitioners here do not present a substantial federal question and the petition should be denied.

This Court in the case of *Leonard* v. *Vicksburg R. Co.*, 198 U. S. 416, 49 L. Ed. 1108, said:

"A federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error."

In the case of *Boston* v. *Jackson*, 260 U. S. 309, 67 L. Ed. 274, this Court said:

"A judgment will be affirmed on motion when, in view of previous decisions, the questions presented by the plaintiff in error are so wanting in substance as not to need further argument."

This Court in the case of *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 68 L. Ed. 382, said:

"The mere fact that a state supreme court decides a party's claim of property or contract right by revers-

ing its earlier decision of the law applicable to such cases, does not deprive him of his property without due process of law, contrary to the Fourteenth Amendment, nor amount to the passing of 'any law' impairing the obligation of contracts, contrary to the contract clause of the Constitution. This has been so often adjudged by the Supreme Court that contentions to the contrary are without substance and a writ of error dependent on them must be dismissed for lack of jurisdiction."

Again, this Court in the case of *Equitable Life Assur. Soc.* v. *Brown,* 187 U. S. 308, 47 L. Ed. 190, said:

"A writ of error will be dismissed where the subject-matter of the controversy is not inherently federal, and the only federal question raised has been so explicitly decided by the United States Supreme Court in accordance with the ruling of the lower Court as to preclude further argument on the subject."

Again, this Court in the case of *King* v. *West Virginia,* 216 U. S. 92, 54 L. Ed. 396, said:

"Contention that the Fourteenth Amendment is violated by Const. W. Va. Art. 13 and Code, ch. 105, for the forfeiture to the state of lands not listed by the owner for taxation for five successive years, with liberty to the owner to intervene and redeem, having been decided adversely in a prior decision of the Federal Supreme Court, affords no basis for a writ of error."

Following the rule laid down in the above cases, this Court denied petitions for certiorari wherein the petitions raised the same question of constitutionality of state unemployment compensation acts, which acts, for all practical purposes, are the same as the act here in question in the following cases:

Howes Brothers Company v. *Massachusetts Unemployment Compensation Commission, et al.*—Petition for Writ of Certiorari to the Supreme Judicial Court, County of Suffolk, Commonwealth of Massachusetts. Denied. 300 U. S. 658, 81 L. Ed. 867.

Beeland Wholesale Company, et al. v. *Harwell G. Davis, Individually, etc.*—Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Denied. 300 U. S. 681, 81 L. Ed. 884.

Alpha Portland Cement Company v. *Harwell G. Davis, Individually, etc.*—Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Denied. 300 U. S. 681, 81 L. Ed. 884.

CONCLUSION

Since it appears that the question raised as to the validity of the Act creating the Arkansas Department of Labor is one purely of local law and the interpretation placed thereon by the court of the State of Arkansas is final, this portion of petitioner's complaint does not raise any federal question over which this Court might take jurisdiction. The petition filed herein with reference thereto should be denied.

The question raised in which the petitioners complain that Act 391 of the General Assembly of Arkansas of 1941 violates the Fifth and Fourteenth Amendments to the Federal Constitution is likewise without merit in that said question was foreclosed by this Court in its decision in the cases above referred to, i.e., *Buckstaff Bath House Company* v. *Ed I. McKinley,* 308 U. S. 358, 84 L. Ed. 322, and *Carmichael* v. *Southern Coal & Coke Company,* 301 U. S. 495, 81 L. Ed. 1245, for in these cases every feature of such an Act as the Arkansas Employment Security Law contains was dis-

cussed by the Court and decided against the contention of the petitioners here.

Under the holding of this Court in the cases above quoted from, the questions raised in the petition for certiorari have been decided by this Court in prior cases, and said decisions are decisive of the case here; therefore, petition for certiorari will be denied.

The petitioners in their petition and complaint fail to show any reason why they are aggrieved or could be aggrieved by any of the provisions of Act 391 of the Acts of the General Assembly of 1941. They fail to allege or show that by reason of any of the provisions of said Act, except the payment of the tax, they would be deprived of any rights by reason of the passage of said statute. The exaction of the tax and the procedure for the exaction of the tax only could affect either of the petitioners and, in this connection, in their petition for review they concede the right of the Legislature to impose and collect the tax laid under the Arkansas Employment Security Act. In Paragraph 19, on Page 3, of the petition filed herein, we find this statement made by petitioners: "That petitioners are aware of the decisions of this Court, bow thereto, and do not question the authority of the General Assembly of the State of Arkansas to pass a law imposing a tax to create a fund out of which to pay benefits to employees who are out of employment." Therefore, it appears that instead of challenging the validity of that portion of the Act that affects them, they concede its validity thereby waiving the question and causes the question presented here to become, be, and remain frivolous (See case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Cooperative Marketing Association,* 72 L. Ed. 473, to this effect). Said petition should, therefore, be denied.

We, respectfully, submit that petition for certiorari filed herein should be denied.

GUY E. WILLIAMS,
Attorney General for the
State of Arkansas.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 576

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN and HERBERT L. GIPSON

Petitioners

vs.

W. J. McCAIN, ROLAND M. SHELTON, ROSS RICHESIN, Sheriff of Boone County, Arkansas; EULAN MOORE, Clerk of the Circuit Court of Boone County, Arkansas and HUGH BURLISON,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF FOR PETITIONERS

CHARLES M. HAFT,
Attorney for Petitioners

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

MAY IT PLEASE THE COURT:

POINT 1 OF RESPONDENTS BRIEF PAGE 1

We agree with counsel for respondents that July 10, 1944 is the date from which time for filing a petition for certiorari must be computed.

The language of Section 8, which controls the time of filing the petition herein provides that application for a writ of certiorari shall be made within three months after the entry of judgment. In as much as the law does not take note of the fractions of a day, July 10th is not to be counted as part of the three month period, but conversley it is to be excluded.

Burnett vs Willingham Loan etc 282 U. S. 437.
U. S. vs. Hardy 74 Fed. 2nd 841.
Pillsbury vs Alaska Packers Asso. 78 Fed. 2nd 587.
Wheeler vs Lumbermans Mutual 6 Fed Supp 532.
The Leopard 1 Fed. Supp. 219.
U. S. vs Beaman 61 Fed. 2nd 493.
Creasy vs U. S. 4 Fed. Supp. 475.

The petition was filed herein October 10th, 1944 and was therefore within the three month period.

We computed the time for filing the petition herein in accordance with the rule herein before stated. Should the court take a different view we ask an extension of time as provided for by Section 8 (a).

POINTS 2 AND 3 OF RESPONDENTS BRIEF (Page 2)

We invite this courts attention to questions raised which, instead of being frivolous, are so well founded that opposing Counsel did not care to argue them.

This case was tried on the pleadings, alone. The complaint alleges, that section 1 of article IV of the state constitution provides that all of the powers of government shall be divided into three departments, to be known as the Executive, Legislative and Judicial; that nowhere in said constitution is a Department of Labor created or permitted (R1); that section 1 of article VI of said constitution provides that the Executive Department of the state shall consist of, a Governor, a Secretary of State, Treasurer of State, Auditor of State and Attorney General. The Section then provides that the General Assembly may provide by law for the establishment of the office of Commissioner of state lands;

That by Section 2 of Chapter 97 Pope's Digest (Act 161 of 1937 the General Assembly attempted to establish a fourth department, called The Department of

Labor, but owing to the constitutional provisions aforesaid act is unconstitutional and void and is in violation of the Federal and State Constitutions as herein after pointed out because a void act is no act and cannot constitute due process.

The complaint alleges that section 5 (a) of the Arkansas Security law violates the equal protection clause of the XIV amendment to the Federal Constitution and also violates the due process clause of said XIV amendment (R 3 and 4);

That Section 5 (2) also violates said XIV amendment (R 4);

That section 6 (4) of said act violates the equal protection of the law provision of the XIV amendment (R 4);

That section 6 (5) of said act violates the equal protection clause of the XIV amendment (R 4 and 5);

That Section 5 (d) (2), section 15 section 6 (2) and Section 6 (4) of said act all violate the XIV amendment to the Federal Constitution (R 5);

That Section 6(m) violates the XIV amendment;

That Section 7(a) violates the XIV amendment (R 5 and 6);

That Section 3(e) of said act violates both the due process and the equal protection clauses of the XIV amendment (R 6 and 7); That said Act 391 is lacking in due process in violation of the XIV amendment because the many unconstitutional provisions found therein leave it so incomplete and unworkable as to render it lacking in the equal protection of the law (R8);

That Act 391 is so dependent on the Labor Department Law (Act 161) that the former is so incomplete and meaningless without the latter as to render it without due process of law (R8);

At pages 57 to 66 our brief in the Arkansas Supreme Court we did argue that in as much as Act 161 which attempts to create a Department of Labor in violation of Articles IV, V, VI and VII of the Arkansas Constitution is void it eliminates from Act 391 the Commissioner of Labor whose office is attempted to be created by said Act 161 thereby leaving Act 391 much of a hol-

low shell and so uncertain indefinite and incomplete as to render it unconstitutional and void.

We did argue at pages 1 to 44 of the State Court brief that Act 161 is unconstitutional and void.

We did argue at pages 66 to 69 of said brief that Section 2 (6) of said Act 161 violates Sections 5 and 6 of Article XVI thereby rendering the entire act void by the express provision of Section 6 of said Article XVI.

We argued at page 69 that Section 5 (a) of Act 391 violates the XIV amendment.

At page 70 of said brief we argued that section 5 (2) of said Act 391 violates the XIV amendment.

At page 71 of said brief we argued that Section 6 (4) of said Act 391 violates the XIV Amendment. At page 73 of said brief we argued that Section 6 (d) of said Act 391 violates the XIV Amendment. At page 74 of said brief we argued that Section 6 (5) of said Act 391 violates the XIV Amendment.

At page 79 we argued that Section 14 (e) of Act 391 violates the XIV Amendment.

The Arkansas Supreme Court does not even mention any of said propositions, leave alone stating its ruling thereon . Of course circumstances alter cases. The rule stated in the several cases cited by opposing counsel may well be applicable to the facts involved in each of those cases.

The theory of petitioners in invoking articles IV, V, VI and VII of the Arkansas Constitution is that the effect of said constitutional provisions is to render both the Labor Department Act and the Security Act void and in legal contemplation non existant.

Certainly counsel for respondents will not contend that an attempt by respondents to collect an unemployment tax for which there is no lawful authority renders such attempt due process of law. If then it is not due process of law respondents are acting in violation of the XIV amendment to the Federal Constitution.

Do counsel contend that absence of law is due process of law?

The Labor Department Act confers powers upon

the Commissioner that clearly make him an executive officer.

In fact Act 391 is bristting with instances where the Commissioner is required to exercise judgment or discretion both of which are executive powers as distinguished from ministerial powers.

Mississippi vs Johnson 4 Wal 475, 98.
Georgia vs Stanton 6 Wal 50.
U. S. vs Lamar 116 U. S. 132.
Decatur vs Paulding 14 Pet 497, 99.
U. S. vs Guthrie 17 How 284
U. S. vs Edmunds 5 Wal 563
Litchfield vs Richards 9 Wal 575,77
Kendall vs U. S. 12 Pet 524
Bartlett vs Kane 16 How 263, 72
U. S. vs Windom 137 U. S. 636
U. S. vs Blaine 139 U. S. 306
U. S. vs Bashaw 152 U. S. 436

There are still other reasons why Federal questions are involved in this case, reasons that arise under the XIV Amendment.

We asked the State Supreme Court to hold that the attempt of respondents to collect the taxes in question is without due process of law, (1) Because Act 161 of 1937 is in violation of Article IV of the Arkansas Constitution. (2) Because Act 391 is so interwoven with Act 161 that unconstitutionality of the former carried the latter down with it. (3) That Section 2 (6) which attempted to make exemptions not embodied in the constitution which by reason of section 6 of Article XVI rendered Act 391 void in its entirety. Not one word is said in the State Court opinion about any of these questions, which if decided in the only way that they can, in reason, be decided leaves the collection of the taxes in question without due process of law, in violation of the XIV Amendment.

The Supreme Court decided not to decide them.

We also contended that various sections of Act 391 violated the XIV amendment as shown at pages 19, 20 and 21 of our original brief.

Again the state supreme court decided not to decide the questions.

POINT IV OF RESPONDENTS BRIEF

As to point 4 of respondent's brief, while it is true that the constitutional questions there mentioned do not in and by themselves constitute Federal questions, it is equally true that if Act 161 of 1937 which attempts to create the Department of Labor is void, then in as much as by section 10 of Act 391 of 1941 there is created in the Department of Labor the Unemployment Security Division to be administered by a full time Director subject to the supervision and direction of the Commissioner of Labor who shall appoint the Director, it results that there can be no Unemployment Security Division in the Department of Labor because there is no Department of Labor by reason of the fact that Act 161 which attempts to create the Department is unconstitutional and void. There can be no commissioner of Labor under Act 161 which is void. There can be no Director because there is no Commissioner to appoint him as is required by Section 10 of Act 391.

What is required to be done by the Director under Act 391 must be left undone. The multitude of Acts which act 391 requires to be done by the Commissioner of Labor must be left undone for want of a Commissioner of Labor whose existance depends solely on void Act 161, which acts to be performed by the Commissioner are enumerated in the petition herein at pages 6 to 9 inclusive.

Opposing counsel do not even attempt to explain to the court what "due process" there is left upon which to predicate the collection of the unemploymet tax the collection of which petitioners seek to enjoin.

We submit that clearly the due process provisions of XIV amendment to the Federal Constitution are being violated. How can it be otherwise when there is no authority in law upon which the respondents can predicate the collection of the tax.

It is therefore glaringly apparent that a meritorious Federal question which has never been presented to or decided by this court is now before this court and the decision of this court upon this new question is invoked.

Article IV is so plain, simple and free from ambiguity that argument as to its meaning seems out of place. It clearly prohibits more than three departments, between which all powers of government are divided. The meaning of Article IV is so unescapable as to leave no room for construction and the Supreme Court of Arkansas refrained from rendering a decision as to its meaning. That court also evaded rendering any decision as to the effect of Article IV upon the validity of the Labor Department Act (Act 161 of 1937) although called upon to do so by the brief in said Arkansas Supreme Court (pages 20 to 57) and again in the petition for rehearing (Point 5 page 3) and the brief in support thereof at pages 6 to 19. When therefore opposing counsel at page say that this court is bound by the decision of the state court concerning the constitutionality of (Act 161 of 1937) we ask where in its opinion did the state court pass on the proposition to which question the inevitable answer must be "Nowhere."

Another answer to the suggestion of counsel is that there is no legitimate reason for the state court to construe Articles IV; it is too plain to admit of construction; that for the state court to say that Article IV does not prohibit a fourth or labor department in addition to the Legislative, Executive and Judicial Departments would be equivalent to saying that black is white. Either statement is too arbitrary and patently in defiance of the facts to receive recognition in judicial proceedings.

As this court in Ward vs Love 253 U. S. 17 at page 22 very appropriately said: "Whether the right was denied or not given due consideration by the supreme court is a question as to which the claimants were entitled to envoke our judgment and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-federal grounds of decision which were without any fair or substantial support."

We discuss this question in the original brief where we cite Lawrence vs State 276 U. S. 281, which we submit is controlling upon the question under discussion.

As to the unfair and unsubstantial nature of the state court opinion we invite the attention of this court to what is said in our original brief at pages 1 to 13 inclusive.

The opinion of the state court in discussing Act 391 reads in part (R 19) "It is argued that in as much as the act creates a Department of Labor which is placed under the supervision of an officer designated as the Commissioner of Labor, who is charged with the enforcement of the provisions of the act, that it is violative of the following provisions of our constitution to-wit: Section 1, Article IV; Section 1, Article V; Section 1, Article VI; Article VII and Section 9 of Article XIX."

The fact is as shown by our brief in the state court, a certified copy of which is lodged with the clerk of this court, and a motion embodied in our original brief for leave to file it is that we did not raise the questions referred to by the portion of the opinion above quoted, as to Act 391. We did not raise the question involving Section 9 of Article XIX at any time, in any way as to any act, although the state court proceeded to rule upon it and consumed two or more pages of the opinion in so doing (R 20-23). The other questions were raised as to Act 161 of 1937 but were not passed on by the state court.

Act 391 of 1941 does not attempt to create a Department of Labor.

Section 10 of Act 391.

Act 161 of 1937 does attempt to create the Department of Labor.

Section 2 Chapter 97 Pope's Digest.

Although we filed a petition for a hearing and in it called the courts attention to the fact that Act 391 did not attempt to create a Department of Labor; called the courts attention to the fact that Act 161 of 1937 did attempt to create a Department of Labor and that we in our brief attacked its constitutionality under Articles IV, V, VI and VII for so doing; that we in our brief

pointed out our contention that the exemption provisions of Act 391, by Section 6 of Article XVI rendered the entire act void but that the court did not rule thereon, said Arkansas Supreme Court did not modify its opinion, but overruled said petition.

Careful scruting of the opinion of the Arkansas Supreme Court will disclose to your Honors that specific consideration is given to only two propositions concerning the validity of Act 391, (a) Act 391 does not violate Articles IV, V, VI and VII (b) said Act 391 does not violate Section 9 of Article XIX. As to both of these questions, the court is no doubt, right but the peculiar thing about the situation is that neither of these questions were raised in the case, at any time or in any way. (R 16-23). So far as the opinion is concerned one would think that the court had never heard of Act 161, of 1937.

Many questions were raised as to the violation of both the Federal and State Constitutions but none of these questions are mentioned in the opinion at any time or in any way. Such is the extraordinary, arbitray and evasive character of this opinion.

It certainly is not a judicial adjudication, as it is required to be. Clearly what is said in the Arkansas Court's opinion is obiter dictum and is not binding on this or any other court.

In the case here presented however the Supreme Court of Arkansas has flagrantly violated the XIV Amendment. That amendment applies to all branches of state government, judicial as well as legislative. Chicago Burlington and Iumcy vs Chicago 166 U. S. 226, 33, 4. Virginia vs Rives 100 U. S. 313. Home Insurance Co. vs Los Angeles 227 U. S. 228. Georgia vs Decatur 281 U. S. 505. Mooney vs Hoolaham 294 U. S. 103, 12, 13.

In Traux vs Corrigon 257 U. S. this court at page 324 says: "The facts alleged are admitted by the demurrer and in determining their legal effect as a deprivation of plaintiffs legal rights under the XIV Amendment, we are at as full liberty to consider them as was the state supreme court. ** Nor does the courts declaration that the statute

is a rule of evidence bind us in such an investigation."

Petitioners submit that respondents second and third ground is wholly without merit in that numerous grounds involving Federal questions are raised by the petition and argued; that said grounds are summerized in the subject index following page 17 of the petition.

The provisions of the XIV Amendment are invoked at pages 10, 17, 19, 20 and 23 of petitioners brief and we submit that for the several reasons in said brief discussed it is made to clearly appear that said XIV Amendment is violated in the numerous particulars therein referred to. As to the third ground of said motion we respectfully submit that Articles IV, V, VI and VII of the Arkansas Constitution are so plain, clear and free from ambiguity as not to admit of construction, but unequivacally command that there shall be only three departments of government in the State of Arkansas, and said articles constitute an invulnerable barrier to a fourth department, thereby rendering the Labor Department Act (Act 161 of 1937) unconstitutional and void; that without said act, Act 391 is so meaningless and incomplete as to render it void. With these two acts being void there is no law in the State of Arkansas authorizing the collection of the tax here complained of.

How then can it be said that the collection of said tax is not without due process of law. For want of due process of law the XIV Amendment is clearly violated and said Act 161 of 1937 is void and in the eyes of the law is not a law.

The opinion of the Arkansas Supreme Court is so arbitrary and evasive as not to constitute "due process of law" in violation of the XIV Amendment.

By our original brief pages 20-40 filed in the Arkansas Supreme Court we asked that court to sustain our contention that the Labor Act (Act 161 of 1937) attempting to create a fourth Department of State, called the Department of Labor, was in violation of Article IV and its kindred Articles V, VI, and VII but the court evaded making a ruling upon the question and preferred to rule that the Unemployment Act (Act 391 of

1941) did not violate any of said constitutional provisions and concluded its opinion by saying:

> "In-as-much as we think Act 391 is constitutional, the decree from which is this appeal must be affirmed, and it is so ordered."

We did not contend in the Arkansas courts that Act 391 violated Articles IV, V, VI and VII of the State Constitution. The State Court took great pains to rule that it did not but refused to rule upon our contention that Act 161 of 1937 (The act purporting to create a Department of Labor) did violate said constitutional provisions. The Supreme Court remained silent on the question and although again urged in the petition for rehearing to rule on the question (R 25) the court evaded the question. After referring to Buckstaff Bathhouse Company vs McKinley 198 Ark. 91 and McKinley vs Payne 200 Ark. 1114, the Arkansas Supreme Court says: (R 17)

> "It is argued that neither of the opinions of this court are conclusive of the constitutionality of Act 391 of the Acts of 1941 for the reason that obligations to the constitutionality of Act 391 here raised, were not raised or considered in either of the prior cases arising under act 155 of 1937, and Act 200 of the Acts of 1939.
>
> "This is true and we therefore consider the objections to Act 391 of the Acts of 1941."

As elsewhere stated Act 391 does not attempt to create a Department of Labor, that attempt was made by Act 161 of 1937, which is not mentioned at any time in any place or in any way in the opinion. In short the state court does not pretend to pass upon the constitutionality of Act 161 which clearly violates Article IV of the State Constitution.

The opinion expends three pages (R 20—23) in discussing the question whether Act 391 violates Section 9 of article XIX which is not raised or discussed in the briefs . Without discussing the effect of Articles IV, V, VI and VII upon Act 161 the opinion abruptly and arbitrarily says:

> "In our opinion Act 391 does not offend against any of these provisions." The opinion

concludes: "In as much as we think Act 391 is constitutional the decree from which this appeal must be affirmed and it is so ordered."

POINT 5 OF RESPONDENTS BRIEF AND PART II OF AGRUMENT

Carmichall vs Southern Coal and Coke Company 301 U. S. 495 is a very far reaching decision and covers many questions that might arise in discussing a law to create a fund out of which to pay benefits to unemployed labor. There are however many provisions embodied in the law here involved that are not to be found in the law involved in the Carmichall case. Questions here involved and presented which are not to be found in the Carmichall case are set forth in sub-paragraph 7 of paragraph 28 of the petition herein at pages 11 to 13. To avoid repetition we again invite the attention of the court to said allegations and submit that they constitute a complete answer to what opposing counsel say about the controlling effect of the Carmichall case. In so far as the opinion is in point we have no fault to find with it. We differentiate it however from the case here presented so far as the question of exemptions is concerned. This point of difference arises by reason of sections 5 and 6 of Article XVI of the Arkansas Constitution. This question is presented at page 17 of our original brief herein.

In deciding Buckstaff Bathhouse Company vs McKinley, Commissioner 308 U. S. 358 this court gave no consideration to any constitutional question, as appears from page 361 of the opinion where this court says:

> "The Supreme Court of Arkansas affirmed a decree sustaining a demurrer to the bill and dismissing it on the ground that the Arkansas Statute was applicable to petitioner and that presentation of the acts in question petitioner did not set up the claimed immunity. We granted certiorari because the decision was asserted to be repugnant to the acts vesting exclusive jurisdiction over the Hot Springs reservation in the United States. We agree with the Supreme Court of Arkansas that the State has jurisdiction to impose the tax in question."

We submit that said case is not even remotely in point, on any question involved in the case here presented. We discuss the state court decision of that case found in 198 Arkansas 91 at pages 9 to 12 of the brief herein in support of the petition to which the attention of this court is again specially invited. As we point out at page 10 the opinion specifies the questions before the court for decision but mentions no constitutional question. The court even says that the constitutionality of the act is not directly questioned on the appeal.

If this court will compare the points shown in the subject index immediately following pages 17 of the petition with the paragraphs of the syllabli in the Carmichall case as set forth at page 8-9 of opposing counsels brief it will be readily noted that the Carmichall case does not cover any of the points raised by the petition herein.

While at first blush the contrary may seem to be true as to paragraph 7 of said syllabli, scrutiny will readily disclose that the point raised as to exemptions is founded upon specific and ironclad provisions embodied in sections 5 and 6 of article XVI of the Arkansas Constitution and leaves the point covered by point 7 of the syllabi in no wise pertinent. This will appear from pages 17-19 of our brief which covers 2(6) of Act 391, and relates to the subject of exemptions.

Section 5 of said Article XVI fixes exemptions from taxation and section 6 arrogates unto the constitution the sale function of exemptions from taxation and renders any act that attempts to create other exemptions absolutely void.

PART I OF RESPONDENTS ARGUMENT

Counsel for respondents at page 7 to 12 of his brief herein tells this court that you are bound by the decisions of the state court concerning any of the state court constitutional questions thereby leaving respondent without a hearing and rendering the state court proceedings in violation of the XIV Amendment. But where are the decisions of the state court that this court is bound to follow? Counsel does not point them out.

We cannot find them in the state court opinion,

(R 16 to 23) and if this court can find them we will be greatly surprised.

> This court in Lawrence vs State 276 U. S. 276 U. S. 281 says: "But the constitution which guarantees rights and immunities to the citizens likewise insures him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds it is the province of this court to inquire whether the decision rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

We submit that this case comes fairly within the four corners of the case from which we have just quoted. Petitioners pray this court to grant them a hearing and pass upon the questions which the court refused to decide.

This court is free and unhampered by any state court decision except the two hereinafter referred to and may treat the questions as of first impression.

Stated as it is, without limitation or qualification, the language employed is not correct, as is evidenced for instance, by one of the cases cited by counsel—Tampa Water Works Co. vs. Tampa 199 U. S. 241 where this court states the true rule as follows:

"The Federal Supreme Court has no power to review a decision of a state court which puts upon a state statute a construction which removes every question of the constitutionality from it, *and seems to us reasonable* if a somewhat different one could be conceived." (The italics are ours)

Other limitations on the rule as stated by counsel are, that to be binding on the Federal Court the state court decision must not be arbitrary or evasive and must rest upon a fair and substantial basis. Cases bearing upon this subject are cited and quoted from in our brief at pages 14 and 15 where a number of cases are referred to.

In Siler vs Louisville & Nashville RR Co. 213 U. S.

175 this court in passing upon the constitutionality of an act which it was claimed did not constitute due process of law at page 194 said: "In this case we are without the benefit of a construction of the statute by the highest court of Kentucky, and we must proceed in the absence of state adjudication upon the subject. Nevertheless, we are compelled to the belief that the statute does not grant to the Commissioner any such great and extensive power as it has assumed to exercise in making the order in question." This is precisely the position in which this court now finds itself.

In the case here presented this court is called upon to determine whether Act 161 of 1937 constitutes due process and that question hinges upon the constitutionality of that act from the viewpoint of Article IV of the Arkansas Constitution. The state supreme court refused to consider the question thereby leaving it to this court to make its own ruling on the question as was done in the case from which we have just quoted.

Except for the two decisions referred to elsewhere this court is without the benefit of the opinion of the Arkansas Supreme Court and must proceed to initiate your own opinion, upon the constitutionality of Acts 161 and 391.

In Schuylkill Trust Co. vs Pennsylvania 296 U. S. 113 this court at page 119 said: "The appellee relies upon the statement of the Supreme Court of Pennsylvania that the levy is upon the shares and not upon assets. The appellant asks us to find to the contrary. We give great weight to the characterization of a tax or the interpretation of a state law eminating from the highest court of the State, but where a Federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect."

To the same effect is Senior vs Braden 295 U. S. 422, 9.

In Great Northern Railway vs Washington 300 U. S. 154 this court in quoting approvingly from Norris

vs Alabama 294 U. S. 587, says:

> "When a Federal right has been specially set up and claimed in a state court, it is our province to inquire, not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Other wise, review by this court would fail of its purpose in safeguarding constitutional rights.
>
> "Thus, whenever a conclusion of law of a state court as to a Federal right and findings of fact are so intermingled that the later control the former, it is encumbent upon us to analyze the facts in order that the appropriate enforcement of the Fedeal right may be assured."

Other cases of similar import are, Johnson Oil Co. vs Oklahoma 290 U. S. 158, 9. Beidler vs South Carolina Tax. Com. 282 U. S. 1. Smith vs. Cahoon 283 U. S. 553. Cumberland Coal Co. vs. Board 284 U. S. 23, 8.

In Union Pacific vs Pub. Service Com. 248 U. S. it was charged that certain exactions from railroad company were an interference with Interstate Commerce. The Supreme Court of the state avoided the question by holding that the payment was voluntary. And it was argued that such decision excluded the jurisdiction of this court. At page 69 this court said:

But the later decisions show that such is not the law and on the contrary it is the duty of this court to examine for itself whether there is any basis in the admitted facts or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. Creswill vs Knights of Pythias 225 U. S. 246. Were it otherwise as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burdens by the threat of penalties worse than in case of a failure to accept it and then declare the acceptance voluntary as was attempted in Atchison, Topeka and Santa Fe Ry Co. vs. O'Conner 223 U. S. 280.

In the case here presented the state court evaded

passing upon a controlling question, that of the violation of Article IV of the State Constitution by Act 161 of 1937, and substituted for such ruling a ruling that Act 391 was not in conflict with Article IV. This makes it necessary for this court to accept the state court decisions in Martin vs State 60 Ark. 343 and Stanley vs. Gates 179 Ark. 897 as controlling and holding as they do that there can be only three departments and only such as are defined by the constitution or else this court must rule upon the question which the State Court evaded. Such ruling by this open minded court will be easy because the language of Article IV is so clear and unmistakable as to require no construction but only reading. The two cases last cited are quoted from at pages 6, 7 and 8 of our brief herein.

In Enterprise Irrigation Dist. vs Canal Co. 243 U. S. this court at page 164 said: "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. ****** and this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere devise to prevent a review of the decision upon the federal question."

In Stanley County vs Caler 190 U. S. this court at page 444 in reference to decisions determining the right of property says:

> "But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of Commercial law and general jurisprudence."

There is no decision of the Arkansas Supreme Court upon the proposition that Act 161 of 1937 violates Article IV of the State Constitution. Said Act attempts to create a Department of Labor.

There are decisions, State vs Martin 60 Ark. 343 and Stanley vs Gates 179 Ark. 897 cited at pages 26, 27 and 29 of the State Court brief, stating the force of Article IV, as heretofore pointed out at pages 6, 7 and

8 of our original brief. These decisions we would be glad to have this court follow. The State Supreme Court evaded doing so, but instead it devoted several pages of its opinion to the propostion that Act 391 does not violate Section 1 of Article IV Section 1 of Article V, Section 1 of Article VII, a question which was not before the court also; that said act does not violate Section 9 of Article XIX, another question which was not before the court. (R 19-23) nor does Act 391 create an administrative agency as recited in the opinion (R 20), nor does it create any kind of an agency. The creating is left which created a department as distinguished from an agency to Act 161, Counsel for respondents tell you that you are bound to follow this opinion. This court has held in Lawrence vs State Supra and in many other cases, some of which we have vited herein has repeatedly stated that the Federal Constitution which guarantees rights and immunities likewise insures the citizen the privilege of having said rights judicially declared and even though the claimed constitutional rights are denied on non-federal grounds it is the province of this court to determine whether the decisions is evasive, arbitrary or rests upon unsubstantial grounds.

We submit that the opinion here involved is obviously evasive, arbitrary and unsubstantial.

These last two cases leave no doubt as to the power and duty of this court, upon the record here presented. Unless the two cases above cited settle the law it is the right and duty of this court to exercise your own judgment and settle it.

We have no doubt that learned counsel have brought forward all that can be said in opposition to the petition filed herein, but has necessarily left petitioners right to a hearing and reversal beyond question.

Wherefor petitioners again ask that the prayer of said petition be granted.

CHARLES M. HAFT,
Attorney for Petitioners

(11)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 576

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN and HERBERT L. GIPSON

Petitioners

vs.

W. J. McCAIN, ROLAND M. SHELTON, ROSS RICHESIN, Sheriff of Boone County, Arkansas; EULAN MOORE, Clerk of the Circuit Court of Boone County, Arkansas and HUGH BURLISON,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR REHEARING.

CHARLES M. HAFT,
Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 576

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MAY IT PLEASE THE COURT:

Come now the petitioners herein Aubrey Hickenbottom, Clarence N. Hudson, Earl E. Bonsteel, F. L. Coffman and Herbert L. Gipson and petition the

court to grant unto them a rehearing herein and in support of this petition respectfully show:

That this court in disposing of the vast volume of litigation coming before it must have failed to take note of important and controlling matters as follows:

That Act 161 of 1937 attempts to create a fourth Department of state, styled a Department of Labor.

That Article IV of the constitution of the State of Arkansas provides,

"The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another."

That Article V of said constitution vests the legislative powers of the state in a General Assembly.

That Article VI of said Constitution provides, "The executive department of the state shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney General **** and the General Assembly may provide for the establishment of the office of commissioner of State Lands."

Article VII provides how the judicial power of the state shall be vested.

In discussing a somewhat similar matter the court in State v Martin, 60 Ark. 343, at page 350, said:

> "The idea of two Governors, Secretaries of State, Treasurers, etc., is unknown in the history of the State governments in this republic."

and again the court at page 348 says:

> "Its object is to outline the departments of government and apportion its various powers among them." In speaking of the officers of the Executive department provided for by Section 1 of Article VI the court at page 349 says:

> "No one would contend that there could be more than one of each of these functionaries. *** It would be utterly incompatible with the duties of these officers to have a divided department and a head for each. * * * For instance Sec. 2 pro-

vides: The supreme executive power of this state shall be vested in a chief *magistrate* who shall be styled, "the Governor of the State of Arkansas." ***There con be but one chief magistrate, one commander in chief.

In Staney v. Gates, 179 Ark., at page 897, the court says:

"The Constitution defines the duties of each department of government." * * *

Again at page 898 the court says:

"The three departments of government are of equal dignity and no one of them can encroach upon the other." We here have a clear statement by the Arkansas court itself that the constitution limits the departments of government to three.

Petitiontrs further show unto the court that the Arkansas Constitution does not define the duties of a Department of Labor and does not even mention such a department.

That in view of the refusal of the Arkansas Supreme Court to rule upon the constitutionality of Act 161 of 1937, thereby rendering the judgment of said court in violation of the XIV amendment to the Federal Constitution it became the imperative duty of this court to itself make such ruling and a failure so to do would constitute a violation of the V amendment to the Federal Constitution, and at the same time deprive petitioners and thousands of other taxpayers in Arkansas, who are coompelled to pay taxes under Act 391 of 1941, of their property without due process of law in violation of the XIV amendment to the Federal Constitution.

Siler vs Louisville and Nashville RR 213 US 175 and cases cited in our reply brief at pages 14, 15, 16 and 17.

Petitioners entertain great fear that their reply brief did not reach the court in time to receive the courts attention and now respectfully ask the court to give it consideration and to particularly to take note of the decisions of this court cited and quoted from as follows:

Lawrence vs State 276 U. S. 281—At page 14 of Reply;

Siler vs Louisville 213 U. S. 175MAt Page 14 of Reply;

Schuylkill vs Pennsylvania 296 U. S. 113—At page 15 of Reply;

Great Northern Railway vs Washington 300 U. S. 154—At page 15 of Reply;

Union Pacific vs Pub. Service Com. 248 U. S. 69—At page 16 of Reply;

Enterprise Irrigation Dist. vs Canal Co. 243 U. S. 164—At page 17 of Reply;

Stanley County vs Caler 190 U. S. 444—At page 17 of Reply.

Wherefore petitioners pray that this court adjudicate,

(1) That the opinion and judgment of the Supreme Court of Arkansas is arbitrary and evasive and violates the XIV amendment to the Federal Constitution:

(2) That Act 161 of 1937 is in violation of Articles IV, V, VI and VII of the Arkansas Constitution and each of them, and is unconstitutional and void.

(3) That Act 391 of 1941 is so interlocked with, and dependent upon, Act 161 of 1937 as to render said Act 391 so incomplete, indefinite, uncertain and meaningless as to render it void.

And petitioners will ever pray.

CHARLES M. HAFT,
Attorney for Petitioners